Supreme Court, U.S.
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No. 10-539 OCT 21 2010

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

John A. Modzelewski
Petitioner

v.

Thomas V. Proch
Respondent

On Petition For A Writ Of Certiorari To The Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

John A. Modzelewski
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Filing Pro Se as continuing litigant
as Administrator of Estate for
Helen Modzelewski, original objector

QUESTIONS PRESENTED

I) Whether, in the adjudication of a dispute involving a U.S. Treasury security registered in co-ownership, the use of a state law based on the Uniform Probate Code's Article VI, Part 2, "Multiple-Person Accounts" is pre-empted by virtue of Article VI, Clause 2, of the U.S. Constitution?

II) If I) is answered in the negative (or undecided), whether Pennsylvania's modified version of the Uniform Probate Code, Article VI, Part 2, "Multiple-Person Accounts", or MPAA, is in conflict with federal law and, per *Free v Bland*, 369 US 663 (1962), "must yield"?

PARTIES TO THE PROCEEDING

Petitioner is John A. Modzelewski.

Respondent, who was the Appellee in the Pennsylvania Supreme Court, is Thomas V. Proch.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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Appeal from the Pa Supreme Court decision of March 25, 2010 IN RE: Alice G. Novosielski, Deceased

Final order (from the Supreme Court of Pennsylvania):
Petitioner's "Application for Reargument" was DENIED on **July 28, 2010**

The opinion of the Pa Supreme Court:
No. 35 WAP 2008: *In Re: Alice G. Novosielski, Deceased,* Pa. Supreme Court opinion entered March 25, 2010

The opinion of the Pa Superior Court:
No. 265 WDA 2007 *In Re: Estate of Alice G. Novosielski, Deceased*, Pa. Superior Court opinion entered Sept. 25, 2007

The opinion of the PA Orphans' court:
65-01-2214 *In Re Alice G. Novosielski* Pa. Court of Common Pleas of Westmoreland County entered Jan. 8, 2007

The Master Report and its recommendations are unreported.

STANDING

Appellant, John A. Modzelewski, claims standing to initiate this action in federal court as the Administration of the estate of his mother, Helen Modzelewski, who died October 2003.

The dispute was initiated in Pa Orphans' civil court by Helen Modzelewski, sister to Mrs. Novosielski. As a 20% beneficiary in the 1995 Novosielski will, Mrs. Modzelewski filed suit in Pennsylvania Orphans' court in 2001 claiming that the $500,000 US Treasury Bill was an estate asset.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

Reference is made to US Supreme Court Rule 10(c):

> "a state court . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court".

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the following are set forth in Appendix D to this petition:

1) - US Code
- Code of Federal Regulations
Title 31 "Money & Finance: Treasury"
Chapter II – Fiscal Service, Department of the Treasury
Part 357 "Regulations Governing Book-Entry Treasury Bonds, Notes And Bills"

2) 20 Pennsylvania Consolidated Statutes
Commonly referred to as the "Decedents, Estates and Fiduciaries Code"
Chapter 63 "Multiple Party Accounts" (MPAA)

3) UNIFORM PROBATE CODE
(Last Amended or Revised in 2006)

Drafted by the
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS and by it
APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES
WITH COMMENTS

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SUMMARY OF *NOVOSIELSKI*

IN RE: Alice G. Novosielski, Deceased is a 2010 decision by the Pennsylvania Supreme Court involving a $500,000 U.S. Treasury Bill purchased via *TreasuryDirect.* [1]

Petitioner asserts that the Pa. Supreme Court's *Novosielski* decision that a state law, MPAA (or Multiple Party Accounts Act), a modified version of the Uniform Probate Code, must be used to adjudicate disputes involving U.S. Treasury securities is:

(1) a *per se* violation of federal law (Question I),

(2) in "conflict" with federal law (Question II), and per *Free v Bland,* 369 US 663 (1962) "must yield".

Novosielski has generated significant interest in Pa.

Petitioner has consistently argued at each state court level that Pa. state MPAA law does not, and cannot, apply to U.S. Treasury securities. [2]

The Pa. Superior Court's *Novosielski* decision, however, opined that Pa.'s MPAA does apply, but

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[1] *TreasuryDirect* was initiated by the U.S. Treasury in1986 to facilitate retail purchases of U.S. Treasury securities without the use of a third party intermediary, such as a brokerage firm.

[2] As detailed in Appendix E, the judicial questions raised to this Court were timely raised in Petitioner's briefs to each Pennsylvanian court.

further decided that Petitioner had met his burden of proof that Mrs. Novosielski did not intend Respondent to have a right of survivorship in the "joint account". As such, *Novosielski* became the first case in almost 30 years in Pennsylvania in which a right of survivorship in a "joint account" purportedly covered by MPAA, had been successfully challenged by an objector. The Pa. Supreme Court opinion (closely watched by estate attorneys in Pennsylvania) focused primarily on the Pa. Superior Court's judicial reasoning relative to MPAA which was not accepted by the Pa. Supreme Court, and reversed. [3]

Petitioner asserts that the judicial reasoning of either the Pa. Superior Court or the Pa. Supreme Court in *Novosielski* on the proper interpretation and application of Pa.'s MPAA is rendered meaningless, in that co-owned U.S. Treasury securities simply are not subject to any state law directed to "joint accounts".

Judicial logic of *Pennsylvania v. Nelson* applies

In the *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) decision regarding the federally enacted Smith Act, Chief Justice Warren's opinion succinctly detailed the judicial reasoning used by this Court in

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[3] Noteworthy, the Pa. Orphans' court's *Novosielski* opinion deferred on whether Pa.'s MPAA applies to U.S Treasuries. However, the Orphans' court opinion was also reversed (erroneously in the opinion of Petitioner) by the Pa. Supreme Court for failure to properly apply Pa.'s MPAA.

determining whether federal law dominates a particular area, thereby, pre-empting any state law.

The judicial rationale of *Pennsylvania v Nelson* (in concert with *Free v Bland*, supra) is directly applicable to *Novosielski*. *Free v Bland* clearly indicated that funding the national debt via U.S. Treasury securities is an area that is the exclusive domain of the federal government. As such, the use of a state law such as MPAA, based upon the Uniform Probate Code, in the adjudication of a U.S. Treasury security dispute is pre-empted by virtue of Article VI, Clause 2, of the U.S. Constitution.

Novosielski contrary to U.S. District Court opinion

The *Novosielski* decision is also in direct opposition to a U.S. District Court decision, *Union National Bank of Texas v Ornelas-Gutierrez, 772 F. Supp. 962 (S.D. Tex. 1991)*, that decided that U.S. Treasury securities are not "accounts" under Uniform Probate Code's "Multiple-Party Accounts" provisions. [4]

Retail purchases of U.S. Treasuries increasing

Novosielski involves an area of significant import; *TreasuryDirect* has grown in size since inaugurated in 1986. Per the U.S. Bureau of

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[4] There appears to be no other cases in which the Uniform Probate Code has been used to adjudicate a U.S. Treasury security dispute.

Federal Debt[5], in excess of 500,000 individuals now hold over $75 billion of U.S. Treasury securities under this program.

CFR indicates that the Code, not state law, controls

The Code of Federal Regulations is quite clear that Part 357 of the Code, "Regulations Governing Book-Entry Treasury Bonds, Notes And Bills Held In Legacy Treasury Direct" has "the effect of overriding inconsistent State laws. See, Free v. Bland, 369 U.S. 663 (1962)." –*CFR 357.45* [6]

Pa.'s MPAA conflicts with federal law

The use of Pennsylvania's state law, or MPAA, does not "essentially mirror" (*Novosielski opinion at*

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[5] "*TreasuryDirect*: "Launched in 2002, TreasuryDirect initially offered electronic savings bonds and was later expanded to include marketable Treasury securities for individuals. More than 270,000 accounts hold over $8 billion." - *U.S. Bureau of Public Debt website*

"*Legacy Treasury Direct*: "Introduced in 1986 when Treasury began issuing marketable securities exclusively in electronic form, this program element encompasses all Public Debt and Federal Reserve activity to establish and service book-entry accounts for marketable securities in Legacy Treasury Direct. Customers hold more than $67 billion in 348,000 accounts" - *U.S. Bureau of Public Debt website*

[6] The judicial logic of *Pennsylvania v. Nelson*, 350 U.S. 497 (1956) preempting any state laws related to sedition activity is applicable, by analogy, to *Novosielski*.

pg 11) federal law. [7] Rather, as fully discussed in Question II, Pennsylvania's MPAA legislation is in direct conflict to federal law in two critical areas [8], and, as such, "must yield" (*Free v. Bland*).

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[7] The *Novosielski* decision was in error *(at 6)* in the determination that, when one purchases a U.S. Treasury security, a security is not purchased, but rather a "deposit of funds" (similar to a "certificate of deposit") is made with a "financial institution", specifically the "Federal Reserve Bank" (*all at pg. 14*). This erroneous characterization of a purchase of a U.S. Treasury Bill was required to force co-owned U.S. Treasury securities to fit Pa.'s MPAA judicial framework.

However, in contrast to the Pa. Supreme Court rationale, the Code of Federal Regulations indicates the correct nature of the transaction. A U.S. Treasury Bill is purchased from the U.S. Government as principal in the transaction:

> "If a Federal Reserve Bank misdirects a payment contrary to instructions provided by the investor, **the United States, as principal**, may remain liable to the investor for the payment." - CFR 357.45 (**emphasis** added)

The CFR is also clear that the Federal Reserve is not operating as a bank providing financial services to private citizens, but is the "fiscal agent of the United States" *(CFR 357.45)* processing any monetary flows to execute the transaction at inception and upon redemption or maturity.

The CFR also indicates a "security" is purchased, "Registration of a **security** conclusively establishes ownership" - *CFR 357.21 (a)*. (**emphasis** added)

[8] The two primary reasons Pennsylvania's MPAA is "contrary to federal law" and "must yield":

1) THE PA SUPREME COURTS FAILED TO ANSWER THE PRIMARY JUDICIAL QUESTION REQUIRED

***Novosielski*: an inappropriate precedent case**

The *Novosielski* opinion also establishes a dangerous precedent in that the Uniform Probate Code (UPC) has been widely adopted at the state level, and, similar to Pennsylvania, has been modified to accommodate legal and banking practices at the state level. There is no assurance that, at the state level, any adoption of the UPC is in concert with the goals and objectives of the U.S. Treasury in the funding of our national debt. The U.S. Treasury's goals and objectives are reflected in the Code of Federal Regulations (and precedent U.S. Supreme Court opinions), not in state law based on the Uniform Probate Code.

STATEMENT OF THE *NOVOSIELSKI* CASE

Novosielski is a 2010 decision by the Pennsylvania Supreme Court involving an

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BY *YIATCHOS V YIATCHOS, US Supreme, 1964,* regarding whether Mrs. Novosielski, had knowledge of the U.S. Treasury Bill purchase, and "consented" (per *Yiatchos*) to grant a right of survivorship to her agent who unilaterally purchased the Bill.

2) PENNSYLVANIA'S MPAA IS IN DIRECT CONFLICT WITH THE CODE OF FEDERAL REGULATIONS (CFR) regarding access to the U.S. Treasury security during each co-owners lifetime. MPAA precludes access; the CFR gives unlimited access.

uncertificated[9], book-entry $500,000 U.S. Treasury Bill[10] purchased via *TreasuryDirect*.

Novosielski is the first, and, therefore, precedent case to litigate a dispute involving a U.S. Treasury security purchased via *TreasuryDirect*. The case has additional significance in that it is the first case in which a state Supreme Court has used a state law based on the Uniform Probate Code to adjudicate a U.S. Treasury security dispute.

The specific Bill in dispute was registered in co-ownership form between Mrs. Novosielski and her agent, Thomas Proch.[11] The U.S. Treasury security was purchased by Mr. Proch in September 2001

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[9] "Uncertificated", per the Uniform Commercial Code, refers to securities in which a paper certificate is not issued, but rather ownership is maintained in electronic form, referred to as electronic book-entry.

[10] The authority of the U.S. Treasury to issue such Bills as the one in dispute in *Novosielski* is vested in Title 31 of the U.S. Code, under Chapter 31, Section 3104 "Certificates of Indebtedness and Treasury Bills".

[11] Proch is the nephew of Novosielski; he is the son Loretta Proch, sister to Novosielski.

Proch is also a 10% beneficiary of the 1995 Novosielski will. He was granted a power of attorney on August 15, 2000.

"using his power of attorney" [12] and "without consulting" [13] Mrs. Novosielski.

The specific judicial question at the state level was whether the $500,000 proceeds were the agent's by virtue of the right of survivorship attached to the U.S. Treasury security, or whether Mrs. Novosielski did not intend her agent to have a right of survivorship, and, if so determined, the $500,000 was an estate asset to be distributed in accordance with the 1995 Novosielski Will.

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[12] Noteworthy, Mr. Proch was described by the Pa. Superior court to be an "opportunist that abused his position as attorney-in-fact" (Superior Court Opinion, page 18). He was surcharged $96,059 for multiple breaches of fiduciary duty.

[13] The Pa Supreme Court opinion (at 5) acknowledged the unilateral purchase:

> "Appellant, acting under the power of attorney, unilaterally authorized a further one-year reinvestment of the account holdings without consulting Decedent".

The Superior Court also made reference to the "Unilaterally T-Bill":

> "At the expiration of the first four 13-week investment periods, appellant (Proch) unilaterally decided to authorize a subsequent one-year reinvestment of the treasury direct holdings without consulting decedent N.T. master Hearing Vol.2, at 302. On November 16, 2001, the decedent died at the age of 79, just weeks after appellant authorized the reinvestment." *Pa Superior Court opinion, at 3.*

Pa. Supreme Court: a state law, MPAA, must be used to resolve dispute

The Pennsylvania Supreme Court reversed [14] two lower court opinions that had previously opined that Mrs. Novosielski did not intend her agent to have a right of survivorship in the $500,000 security. The Pa. Supreme Court awarded the $500,000 to the agent stating that a specific state law, MPAA (Multiple Party Accounts Act) of 20 Pennsylvania Consolidated Statutes, Chapter 63 (a modified version of the Uniform Probate Code specifically Article VI, Part 2 "Multiple Person Accounts" or MPAA) must be used to litigate U.S. Treasury securities:

> "We conclude that the Treasury Direct account, meeting the MPAA's definition of "joint account," is governed by the provisions of the MPAA." –*Pa. Supreme* at 16

QUESTION I.

I) Is the use of a state law based on the Uniform Probate Code's Article VI, Part 2 "Multiple Person Accounts", or MPAA, to adjudicate a dispute involving a U.S. Treasury security registered in co-ownership a per se violation of federal law?

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[14] The Pa. Supreme Court opined that the lower courts had not properly followed the Pennsylvania MPAA legislation and precedent Pa. case law relative to MPAA.

JUDICIAL FRAMEWORK

Novosielski Court did not define federal law

The Pa. Supreme Court in *Novosielski* did not specifically define "Federal law". "Federal law", as used in this brief, originates with Article I, Section 8, Clause 2, of the Constitution, and encompasses:

a) U.S. Code (Title 31, Money and Finance),

b) Code of Federal Regulations (Title 31--Money and Finance: Treasury Subtitle B--Regulations Relating to Money and Finance, Chapter II--Fiscal Service, Department of the Treasury), Department of the Treasury Circulars and any offering announcement relative to the U.S. Treasury security involved, - *Per PD F 5381 E Department of the Treasury, Bureau of the Public Debt "Treasury Marketable Securities Tender" (Revised November 2008)* [15]:

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[15] Form 5381 E was completed by Respondent to initiate the initial purchase of U.S. Treasuries for Mrs. Novosielski 5381 indicates that the Code of Federal Regulations control; Mrs. Novosielski's "signature" on the Tender is followed by the following statement:

> "I submit this tender pursuant to the provisions of Department of the Treasury Circulars, public Debt Series Nos. 2-86 (31Cfr Part 357) and 1-83 (31 CFR 356) and the applicable offering announcement." - *U.S. Treasury Form 5381 E,*

c) Precedent U.S. Supreme Court opinions (*Free v Bland*, U.S. Supreme,1962, and *Yiatchos v Yiatchos*, U.S. Supreme, 1964)

State law "must yield"

In regard to the funding of the national debt by the U.S. Treasury via the issuance of U.S. Treasury securities, *Free v Bland, supra*, clearly indicates that any "conflict" between state law and federal law triggers the Supremacy Clause (Article VI, Clause 2) of the Constitution, and state law "must yield". [16]

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[16] *Free v Bland*, supra, determined that the U.S. Treasury Regulations pre-empts any "inconsistent" Texas community property law when adjudicating U.S. Savings Bonds. The broader principle is:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for the Court that any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." - *Free v Bland (emphasis added)*

BACKGROUND: THE UNIFORM PROBATE CODE

Uniform Probate Code widely accepted [17]

Pennsylvania's MPAA legislation is based on the Uniform Probate Code. [18]

Per the National Conference of Commissioners on Uniform State Laws (NCCUSL), drafters of the Uniform Probate Code, the Uniform Probate Code's "Multiple Person Accounts" provisions has been adopted in totality, or in modified form, by a majority of states, including Pennsylvania:

> "This part of the Uniform Probate Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states."
>
> · *NCCUSL website, www.nccusl.org*

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[17] "The UPC aims to make laws more uniform among the states, and promotes a speedy and efficient system for estate administration. UPC 1991 replaces an earlier Uniform Probate Code (UPC 1969) that has been enacted in 18 states, and accepted in part in all but a few of the remaining states." (Emphasis added) · *NCCUSL website, www.nccusl.org*

[18] In a related case to *Novosielski*, the Pa. Superior Court clearly indicated that Pa.'s MPAA has been adopted from the Uniform Probate Code:

> "The language at issue in 20 Pa. C.S.A. § 6304, Right of survivorship, (a) Joint account, is patterned on language contained within UPC § 6-212(a), Rights at death. We must assume the General Assembly, in adopting various provisions of the UPC, was aware of the primary purposes of the UPC." · *Estate of Piet*, Pa Superior Court

The UPC has been developed in sections; in 1989, the NCCUSL produced the "1989 Uniform Multiple-Person Act", the Model Act from which Pennsylvania's MPAA was adopted. The opening note on the Uniform Multiple-Person Act, the NCCUSL explains the purpose of the Act:

> "This Act is a free-standing version of Part 2 (formerly Part 1) of Article VI of the Uniform Probate Code, as revised in 1989. The Act comprehensively covers the problems of financial institution accounts in which one or more persons have an interest."
>
> *-see entire introductory note, Appendix G*

UPC encompasses a "deposit of funds" with a "financial institution"

The Uniform Probate Code, specifically Article VI, Part 2, "Multiple Person Accounts" or MPAA, specifically covers the "deposit" into an "account" [19] with "financial institutions"[20]. The concept is

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[19] "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account."

– UPC, amended 2006, Article VI, Part 2, 6-201

[20] "(4) "Financial institution" means an organization authorized to do business under state or federal laws relating to financial institutions, and includes a bank, trust company, savings bank, building and loan association, savings and loan company or association, and credit union."

–UPC, amended 2006, Article VI, Part 2, 6-201

simple; individual(s) establishes an "account" at a "financial institution" such as a bank or savings and loan, "deposits" currency, and, in return, receives a specific rate of interest and/or check writing privileges for all parties listed on the account.

Pa. modified the UPC 's "account" definition

The Pennsylvania legislature has taken a broader view of "account" than the one as defined [21] in the Uniform Probate Code. Pennsylvania has added the additional wording, "other like arrangements", to Pa.'s MPAA "account" definition:

> **"Account"** means a contract of deposit <u>of funds</u> between a depositor and a financial institution and includes a checking account, savings account, certificate of deposit, share account and <u>other like arrangements</u>." - *§ 6301, "Definitions"*

(<u>additional language</u> added by Pa. Legislature)

Petitioner notes that the Federal Reserve is referred to as a "fiscal agent of the United States", and <u>not</u> a "financial institution", in the Code of Federal Regulations. - *CFR 357.26*

[21] "Account" means a contract of deposit between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, and share account.
- *UPC 2006, Section 6-201. Definitions*

UNIFORM PROBATE CODE: a *per se* violation

Adjudicating U.S. Treasury securities registered jointly ("co-ownership" per the Code of Federal Regulations) using the Uniform Probate Code (in its entirety, or in modified form as Pennsylvania has done), should be considered a *per se* violation of federal law, triggering the Supremacy Clause as interpreted by this Court in *Free v Bland*, [22] for the following reasons:

REASON 1 to reject use of the Uniform Probate Code:

U.S. Treasury securities, registered in co-ownership, are directly owned, marketable securities issued by the U.S. government; and, not a "deposit of funds" in a "joint account" at a "financial institution"

To force U.S. Treasuries under the UPC's "joint account" framework, the Pa. Supreme Court erroneous declared that U.S. securities are <u>not</u> securities, but rather "deposits" with a "financial institution", and hence, an "account" per §6301:

> "there was clearly a "deposit of funds" made by Decedent that, in turn, created an "account." As the Superior Court correctly noted, the record showed that although Decedent's

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[22] *Morrison v. Alicandro*, U S District Court for Mass, 472 f. Supp. 2d 2; 2007 performed an extensive review of the issue of state versus federal law and concluded that federal law governs disputes involving U.S. Treasury securities.

investment was in a United States Treasury Bill, that bill was **neither presented** *[Note: the actual wording of the Pa. Superior was "delivered" (at para. 20) not "presented"]* to the two account holders **nor titled** in their names." -- *Novosielski opinion at 14* (**emphasis** added)

A U.S. Treasury security is "delivered" and "titled"

The determinations of the Pa. Superior Court, relied on by the Pa. Supreme Court, that the U.S. Treasury Bill in dispute was "neither delivered" and "nor titled", is simply in error.

The Uniform Commercial Code indicates the U.S. Treasury Bill was "delivered",[23] and the Code of Federal Regulations, CFR 357.21 states very clearly that direct ownership, or title, in that the registration of a security "conclusively establishes ownership". (emphasis added)

The Pa. Supreme Court continued their strained logic that, if a U.S. Treasury security is not a

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[23] The U.S. Treasury discontinued the issuance of paper certificates for owners of U.S. Treasury securities in 1986. U.S. Treasuries securities without paper certificates fall under the definition of "uncertificated Securities" per the UCC:

> "Part 3. Transfer of Certificated and Uncertificated Securities § 8-301. DELIVERY.
>
> (b) Delivery of an uncertificated security to a purchaser occurs when: the issuer registers the purchaser as the registered owner, upon original issue or registration of transfer;" - *Uniform Commercial Code* § 8-301.

security, the asset purchased is analogous to a "certificate of deposit":

> "Thus, the Treasury Direct account bore some resemblance to a "certificate of deposit," in that it was a timed renewable investment, and we have no hesitation in concluding that the Treasury Direct account was an "other like arrangement" as contemplated by the MPAA."
>
> – *Pa. Supreme Novosielski* at 15

> "We conclude that the Treasury Direct account, meeting the MPAA's definition of 'joint account,' is governed by the provisions of the MPAA." – *Novosielski at 16*

U.S. Treasury securities are securities

In direct opposition to the Pa. Supreme Court's erroneous characterization that U.S. Treasury securities are "deposit of funds" with the Federal Reserve Bank and, as such, "joint (bank) accounts" covered by the Uniform Probate Code, this Court has clearly opined that U.S. Treasury securities are securities. In *Marine Bank v. Weaver*, 455 U.S. 551,(1982), this Court has construed a "security" in the broad context of the Securities Exchange Act of 1934.

> "the many types of instruments that in our commercial world fall within the ordinary concept of a security," including "stocks and

bonds, along with the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Weaver*, 455 U.S. at 555.

Simplistically, the Pa. Supreme Court determination that U.S. Treasury securities registered in co-ownership are a "joint account" under state law, rather than securities governed by federal law, is negated by the title of the Form used to purchase the U.S. Treasury security: ***"Treasury Marketable Securities Tender"*** - *PD F 5381 E*

Petitioner asserts that the Pa. Supreme Court's "joint account" determination relative to U.S. Treasury **securities** is the central error leading to the a flawed judicial path. [24]

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[24] Petitioner briefs consistently argued that U.S. Treasury securities are <u>not</u> MPAA "accounts" (*see Appendix E*):

> "The asset in dispute requires clarification:
> There are multiple references to a Treasury Direct "account" valued at $500,000. In fact, the item in dispute is not an "account", but rather a <u>specific and identifiable asset</u>. The asset was a marketable $500,000 13-week U.S. Treasury Bill maturing on December 27, 2001, CUSIP # 912795HZ7. (See objector/appellee trial Exhibit T)"
>
> -*Petitioner Brief to Pa. Supreme Court* at 2

REASON 2:

NCCUSL: the MPAA section of the Uniform Probate Code should not be used to adjudicate securities

The NCCUSL (National Conference of Commissioners on Uniform State Laws), drafters of the Uniform Probate Code, have taken the position that the Uniform Probate Code's Article VI, Part 2 "Multiple Person Accounts" should not be used to adjudicate securities. The NCCUSL's position is in direct opposition to the Pa. Supreme Court's *Novosielski* decision.

Rather the NCCUSL has developed a separate Uniform TOD Security Registration Act:

> "The legislation (Uniform TOD Security Registration Act) has been drafted as a separate part, hence not interpolated as an expansion of the former UPC Article VI, Part 1, treating bank accounts ("multiple-party accounts"). Securities merit a distinct statutory regime, because a different principle has governed concurrent ownership of securities." (emphasis added)

REASON 3)

Use of the Uniform Probate Code's MPAA in opposition to U.S. District Court decision

The United States' District Court for the Southern District of Texas, Laredo Division in the case of *Union National Bank of Texas v Ornelas-*

Gutierrez, 772 F. Supp. 962 (S.D. Tex. 1991) did an extensive review of the issue of what constitutes an "account"[25] under the Uniform Probate Code, and opined that U.S. Treasuries registered in co-ownership are not joint accounts under the Uniform Probate Code:

> "This regulatory scheme, examined along with the testimony of the UNB officers, points to the conclusion that the investment by UNB in book-entry T-bills on behalf of Don Joaquin was not an "account" as defined under § 436(1) of the Texas Probate Code"
>
> - *Union National Bank, supra*

The *Union National Bank* decision involved a custodian bank that purchased the U.S. Treasury securities on behalf of the U.S. Treasury. The U.S. Treasury still held the U.S. Treasury security, as noted in the *Union National Bank* decision, in "book-

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[25] U.S. District Court in *Union National Bank* noted:

" *'Definition of "Account'*. The application of § 440 or § 450, therefore, depends on whether #100-155 is an "account" under Chapter XI of the Probate Code. Section 436(1) of the Code states that: 'Account' means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement." *Union National Bank of Texas v Ornelas, supra*

entry" form [26], in the exact manner as the $500,000 Treasury security in dispute in *Novosielski*.

REASON 4:

MPAA does not "essentially mirror" federal law

The Pa. Supreme Court made a contestable determination that state law (MPAA) is not in conflict with the Code of Federal Regulations in one area, the right of survivorship attached to a co-owned U.S. Treasury security:

> "the federal regulations that appear to be applicable to this matter do not pose a conflict with the MPAA with respect to the issue of right of survivorship' – *Pa. Supreme Novosielski at 16*

Novosielski contains a flawed conclusion that the "right of survivorship" provisions under MPAA (state law) and the Code of Federal Regulations "essentially mirror" each other:

> "The MPAA relevantly provides: "Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear

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[26] "Don Joaquin reinvested these funds in "book-entry" United States Treasury Bills (T-bills), using UNB as his broker in the purchase." *Union National Bank, supra*

> and convincing evidence of a different intent **at the time the account is created**." 20 Pa.C.S. § 6304(a). This result is **essentially mirrored** in 31 C.F.R. § 357.21, a federal regulation pertaining to Treasury Direct accounts, which provides that when a security is registered in the names of two individuals joined by the word "or," it creates a conclusive right of survivorship." (**emphasis** added)
>
> - *Pa. Supreme Novosielski at 16*

The judicial question (defined by Petitioner), as required by *Yiatchos v Yiatchos,* was never answered:

> "Did Mrs. Novosielski "consent" (per *Yiatchos*) to granting a right of survivorship in a $500,000 U.S. Treasury Bill when there is no indication in the trial records that she was even aware that such a Bill was purchased?"

Rather than follow *Yiatchos*, as all other precedent cases have done, the Pa. Supreme Court opined that MPAA applies, and it is an objector's burden of proof to establish that Novosielski did not "consent" on the first U.S. Treasury Bill ever purchased by Mrs. Novosielski, i.e. "at the time the account was created" per MPAA.

Awarding the agent the $500,000 U.S. Treasury Bill proceeds does not indicate compliance

The Pa Supreme Court also determined (in a reversal of two lower Pa. court opinions that determined that Mrs. Novosielski did not intend to grant a right of survivorship to her agent whom she had granted a power of attorney) that granting the proceeds of the $500,000 Treasury Bill to the co-owner, or Respondent, indicated compliance with the Code of Federal Regulations (CFR):

> "Because of our ultimate determination that Appellant is the sole owner of the Treasury Direct account under Section 6304(a) of the MPAA, there is **no conflict** with 31 C.F.R. § 357.21, which would require the same result." (**emphasis** added) – *Pa. Supreme Novosielski at 11*

Simply awarding the Respondent the $500,000 proceeds of the U.S. Treasury security does not equate to compliance with federal law; rather, it circumvents the only judicial question raised in the Pennsylvania's courts: Did Mrs. Novosielski consent to granting a right of survivorship to the Respondent in the U.S. Treasury Bill *that* was paid to him by the U.S. Treasury?

REASON 5:

Using the Uniform Probate Code to litigate Treasury security disputes lacks enduring judicial rationale

Even if the Uniform Probate Code (UPC) and the Code of Federal Regulations (CFR) were in agreement at the present time (which they are not), the use of the Multiple Party Account provisions of the UPC need to be proscribed from use in the adjudication of U.S. Treasury disputes. There is no assurance that the two will be in agreement in the future as both the UPC and the CFR have, and will continue to, change in the future.

REASON 6:

Logic dictates that MPAA (state law) is pre-empted

The "Multiple Person Account" provisions of the Uniform Probate Code (UPC) are either:

a) In conformity with federal law, and redundant in the adjudication of a U.S. Treasury security, or

b) At variance with federal law, and precluded from use, per *Free v Bland*, 369 US 663 1962:

> "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail. Article VI, Clause 2. This principle was made clear by Chief Justice Marshall when he stated for

the Court that <u>any state law, however clearly within a State's acknowledged power, which interferes with or is **contrary to federal law, must yield**</u>."

- *Free v Bland*, supra (**emphasis** added)

It is untenable that this Court (or any federal court) should be placed in the position of determining whether a state's MPAA legislation based, in whole or in part, on the Uniform Probate Code is in conformity with federal law. *Novosielski's* use of a state statute, MPAA, is simply in error, and *on a per se basis, the Code of Federal Regulations and U.S. Supreme Court precedent opinions pre-empt any state legislation based on the Uniform Probate Code relating to "Multiple Party Accounts".*

QUESTION II.

II) Is Pennsylvania's modified version of the Uniform Probate Code, specifically Article VI, Part 2 "Multiple Person Accounts" or MPAA related to "joint accounts", in conflict with federal law and, per Free v Bland, U.S. Supreme, 1962, "must yield"?

Question I detailed Petitioner's judicial rationale indicating that the "Multiple Persons'

Account" provisions of the Uniform Probate Code are not applicable in the adjudication of disputes involving U.S. Treasury securities purchased via *TreasuryDirect*.

Question II examines whether the use of Pa. state law, MPAA, based on the Uniform Probate Code, "conflicts" (per *Free v Bland*, supra) with "federal law", and whether such "conflicts" lead to an erroneous judicial path and judicial decision.

The two primary reasons Pennsylvania's MPAA is "contrary to federal law" and "must yield":

1) THE PA SUPREME COURTS FAILED TO ANSWER THE PRIMARY JUDICIAL QUESTION REQUIRED BY *YIATCHOS V YIATCHOS* regarding whether the individual whose funds were used to purchase the U.S. Treasury security, Mrs. Novosielski, agreed with the purchase, and consented to granting a right of survivorship to the surviving co-owner.

2) PENNSYLVANIA'S MPAA IS IN DIRECT CONFLICT WITH THE CODE OF FEDERAL REGULATIONS regarding access to the U.S. Treasury security during each co-owners lifetime.

MPAA CONFLICT ONE (1) with FEDERAL LAW

THE PA SUPREME COURTS FAILED TO ANSWER THE PRIMARY JUDICIAL QUESTION REQUIRED BY *YIATCHOS V YIATCHOS*:

U.S. Supreme Court precedent case law applies

The U.S. Code and the implementing Code of Federal Regulations (CFR) are silent as to the judicial methodology to rebut a right of survivorship in a U.S. Treasury security.

However, precedent U.S. Supreme Court case law provides operational guidance:

1) Any state law in conflict with federal law "must yield" (*Free v Bland,* US Supreme 1962),
2) Actionable fraud need not be asserted or proved to rebut the right of survivorship (*Yiatchos v Yiatchos,* U.S. Supreme, 1964). Rather,
3) It is for the state court to determine if the purchaser of the U.S. Treasury security "consented" (per *Yiatchos*, supra) to grant a right of survivorship to the surviving co-owner.

Yiatchos v Yiatchos, supra, is clear that, at the state level, a court is to determine if the purchaser of a U.S. Treasury security "consented" to giving a right of survivorship to the surviving co-owner:

> "If she gave such **consent**, or if she ratified the purchase and registration of the bonds, the conduct of the husband was not, for federal purposes, fraud or breach of trust sufficient to avoid the command of the regulations, and petitioner would be entitled to all of the bonds."

- *Yiatchos v Yiatchos,* supra (**emphasis** added)

Until *Novosielski,* state and federal courts have been able to implement the *Yiatchos* directive with relative ease. For example, in *Estate of Bray,* 230 Cal. App. 2d 136; 40 Cal. Rptr. 750; 1964 Cal. App., the Court of Appeal of California, First Appellate District cited and implemented *Yiatchos*, supra, and simply made a judicial decision that Mrs. Brey did not agree to grant a right of survivorship to the co-owner of the savings bonds her husband had purchased. There was no attempt to apply any state law, such as MPAA, to adjudicate the *Bray* dispute.

A brief summary of *Novosielski* is in order:

After Alice Novosielski died on November 16, 2001, Proch, her agent with a Power of Attorney, presented a one-page U.S. Treasury Tender (Trial record, 277a) which he claimed Alice Novosielski had signed 14 months prior to her death.

Proch was the architect of the initial investment in U.S. Treasury Bills via a Tender Form PD F 5381

E of the Department of the Treasury entitled, "*Treasury Bill, Note, & Bond Tender*" (subsequently changed to "*Treasury Marketable Securities Tender*") . Within weeks of receiving his Power of Attorney on August 15, 2000, trial testimony indicated he researched investing in U.S. Treasuries, he completed all the information on the Tender form, dated the Tender ("9/19/2000"), secured the $500,000 cashiers' check from Novosielski's bank, and mailed the tender to the Federal Reserve. He even testified that he selected the $500,000 amount (see R. 135a, 295 11-12)

The original tender was only a one year instrument.

The tender was a contract between Alice Novosielski and the U.S. Treasury to purchase (4) four $500,000 13-week U.S. Treasury Bills (approximately 80% of Novosielski's net worth). The Bill was registered in co-ownership between Novosielski and Proch as a result of Proch typing the words "or Thomas V. Proch" on the Tender document.

After one year, the $500,000 was to return [27] to Alice Novosielski.

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[27] The Tender document in section "8. PAYMENT INFORMATION" indicated that the Payment Bank was a bank account at National City Bank in Mrs. Novosielski's name only; this is the account the $500,000 proceeds were to be sent by the U.S. Treasury after one year.

Bill unilaterally purchased (the "unilateral T-Bill") by Novosielski's agent

After one year, Treasury Direct sent a "REINVEST DIRECT NOTICE" (Objector/appellee Trial Exhibit S) dated August 7, 2001. The NOTICE clearly states, "If you don't want to reinvest, disregard this form." Appellant did not consult with decedent if she "wanted to reinvest"; he contacted *TreasuryDirect* and reinvested the $500,000. "Yes, I renewed it " (Proch: Trial record 81; 24)

A non-reply would have triggered the $500,000 to be wire transferred to Mrs. Novosielski's bank account, an account in her name only. Without consulting Mrs. Novosielski, respondent unilaterally purchased a 5th U.S. Treasury Bill, the "Unilateral T-Bill", with himself as co-owner. (R. 137a) When asked if he secured Novosielski's consent [28] to purchase an additional (5th) Treasury Bill, Proch testified "I did not."(R. 137a. 302)

The Pa Supreme Court opinion *(at 5)* noted the unilateral T-Bill purchase [29]:

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[28] The *Yiatchos* "consent" question should have been triggered at this point given that there is no indication in the trial record that Novosielski ever knew that such Bill was purchased. Mrs. Novosielski died 6 weeks after the purchase.

[29] Superior Court also referred to the "Unilaterally T-Bill": " At the expiration of the first four 13-week investment periods, appellant (Proch) unilaterally decided to authorize a subsequent one-year reinvestment of the treasury direct holdings without consulting decedent N.T. master Hearing Vol.2, at 302. On November 16, 2001, the decedent died at

> "Appellant, acting under the power of attorney, unilaterally authorized a further one-year reinvestment of the account holdings without consulting Decedent".

The Bill was registered in co-ownership form with an "or" connector, "Alice G. Novosielski **or** Thomas V. Proch". Per Code of Federal Regulation 357.21, a right of survivorship is attached to the security [30], even though it is not indicated on the Tender Form that Mrs. Novosielski purportedly signed.

Proch was paid the $500,000 by the U.S. Treasury after Novosielski's death; he has maintained possession of this asset throughout this litigation.

Pennsylvania's MPAA has a significant modification to the UPC

Pa. MPAA [31] was adopted, with modifications, from the Uniform Probate Code, Title VI, Part 2.

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the age of 79, just weeks after appellant authorized the reinvestment." - *Pa Superior Court opinion, at 3.*

[30] " (ii) "Or"' form - "Co ownership". In the names of two individuals, joined by the word "or"'. A security so registered shall confer on each owner an undivided interest in the security and shall create a conclusive right of survivorship."

- *CFR 357.21*

[31] The Pa. MPAA legislation states that: "The provisions of this chapter are applicable solely to the determination of

The Uniform Probate Code states that:

> "on death of a party sums on deposit in a multiple-party account belong to the surviving party or parties". - *UPC, Section 6-212*

However, the Pa version of MPAA states:

> "Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent **at the time the account is created.**" **(emphasis** added) - *6304 (a) 20 Pa. Consolidated Statutes*

UNILATERAL PURCHASE BY PROCH MUST BE THE FOCUS OF *YIATCHOS* "CONSENT"

Until *Novosielski,* it was axiomatic that the U.S. Treasury security(s) paid to the co-owner was the security(s) adjudicated to determine whether the individual "consented" to granting a right of survivorship to the surviving co-owner.

The judicial question as required by *Yiatchos v Yiatchos* before the Pa. Courts is simple:

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property rights among parties to multiple-party accounts." *20 Pa Cons. Statutes, 6302*

Did Mrs. Novosielski consent to grant a right of survivorship in the U.S. Treasury Bill (the 'unilateral T-Bill') [32] *purchased by Proch on September 27, 2001; a Bill that he testified he purchased "without consulting" Novosielski?*

However, the *Yiatchos* question was never judicially answered; rather, the Pa Supreme Court reviewed the initiation of the Treasury Direct "account" which was apparently "9/19/2000" [33] which was deemed to be "at the time the account was created" for purposes of Pa.'s MPAA legislation to determine consent (or lack thereof).

***Novosielski* decision ignored the Unilateral Purchase**

The Pa. Supreme Court erroneously failed to adjudicate the "Unilateral Purchase" of the U.S. Treasury Bill by Respondent; rather, per MPAA, the judicial focus was to determine consent "at the time the account was created" (one year prior):

> "Our seminal question, therefore, is whether the Superior Court erred by concluding that the provisions of Decedent's will, together with Decedent's ratification of that will by codicil near the time of the creation of the Treasury

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[32] The "Unilateral T-Bill" is the actual Bill that Proch was paid by the U.S. Treasury.

[33] When Mrs. Novosielski "signed" the Tender, however, is uncertain in that there were no witnesses to the execution, and Respondent testified he completed and dated the Tender.

> Direct account, constituted clear and convincing evidence that Decedent did not **intend there to be a right of survivorship at the time the account was created."**
> – *Novosielski, pg.15* (**emphasis** added)

Awarding Respondent the U.S. Treasury Bill does not equate to compliance with federal law

The Pa Supreme Court, in implementing Pa. MPAA, also made an erroneous judicial conclusion; the Court equated granting the agent the $500,000 proceeds of the U.S. Treasury security with conformity with the Code of Federal Regulations:

> "Because of our ultimate determination that Appellant is the sole owner of the Treasury Direct account under Section 6304(a) of the MPAA, there is no conflict with 31 C.F.R. § 357.21, which would require the same result."
> - *Pa. Supreme Novosielski opinion, pg.11*

As stated previously, the CFR gives no guidance on how to rebut a right of survivorship; as such, the Pa. Supreme logic of equating granting the agent the $500,000 [34] as demonstrating that no "conflict" with federal law exists is simply in error.

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[34] The U.S. Treasury, per the CFR, paid the agent, he was the co-owner. However, the judicial question per *Yiatchos* was did Mrs. Novosielski "consent" to him being the co-owner of the

"Novosielski principle" needs to be established:

The Novosielski principle:

The actual Treasury security paid to the surviving co-owner is the security that Yiatchos "consent", (i.e. whether a right of survivorship was intended), is to be judicially determined.

MPAA CONFLICT TWO (2) with FEDERAL LAW

CODE OF FEDERAL REGULATIONS: provides access to U.S. Treasury security by either co-owner

The security in dispute was registered in co-ownership form, "Alice G. Novosielski or Thomas V. Proch", which, per the CFR, provides that either party can make a "transaction request":

> "(ii) "Coownership". In the names of two individuals, joined by the word "or". A security so registered shall confer on each owner an undivided interest in the security and shall create a conclusive right of survivorship.
>
> Example: Robert Woods or Laura Woods.
>
> If a security is registered in this form, **either coowner may make a transaction request"** - *CFR 357.21 (b) (2)* (**emphasis** added)

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unilateral T-Bill that he purchased without consulting his principal?

[**Note**: A "transaction request", per *CFR 357.2 Definitions*: "Transaction request means a request to effect a change in an account master record or securities portfolio maintained in Legacy TreasuryDirect."]

Upon careful reading of the definition of a "transaction request", the ability "to effect a change in an account master record" is the ability to transfer the security to an account in single ownership. Hence, per the CFR, Novosielski's agent, the Respondent, had direct access to the $500,000 security during her lifetime in direct conflict with Pennsylvania's MPAA state legislation.

Pa.'s MPAA: non-contributing co-owner of U.S. Treasury securities has no right to the funds

In that only Mrs. Novosielski's funds were used to purchase the T-Bill, Respondent had no right under MPAA [35] (in direct conflict with CFR 357.21)

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[35] Most other states have similar MPAA legislation. For example, Minnesota has adjudicated disputes in "joint accounts" using their version of the Uniform Probate Code:

> "The language of the MPAA is unambiguous. In a controversy between parties to a multi-party account and their creditors, funds in a joint account belong to the parties in proportion to their net contributions. A party's net contribution is the amount of money deposited by or for him, less withdrawals made by or for him." - *Savig v First National Bank of Omaha*, Minnesota Supreme Court, 2010, A09-1221

to the $500,000 security, or its proceeds, while Mrs. Novosielski was alive:

Using MPAA, the Pa. Supreme Court <u>erroneously</u> reversed the Pa. Orphans' Court's opinion

The Pa. Supreme Court opined that MPAA requires that *inter vivos* gift analysis <u>not</u> be used (and reversed the Pa Orphans' Court's opinion for using an *inter vivos* analysis):

> "The reasons given by the orphans' court are wholly at odds with the MPAA and our interpretation of its provisions. First, the MPAA makes clear that joint accounts with a presumed right of survivorship are not treated as inter vivos gifts from one account holder to another. Rather, the MPAA plainly provides: '**A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit**, unless there is clear and convincing evidence of a different intent.' 20 Pa.C.S.§ 6303(a)." –*Pa Supreme Novosielski opinion at 24* (**emphasis** added)

The Pa. Supreme Court, using MPAA state law, opined that Novosielski's agent, having made no "net contributions" per MPAA, had no access to the $500,000 U.S. Treasury Bill during Mrs.

Novosielski's lifetime. As such, Pa.'s MPAA is in direct conflict with the Code of Federal Regulations.

Pennsylvania MPAA clearly "must yield"

Pennsylvania's MPAA legislation, a modified version of the Uniform Probate Code's Multiple Party Account provisions, has two material conflicts with federal law:

Conflict 1:

Failure to follow the U.S. Supreme Court precedent case law, *Yiatchos v Yiatchos* to address the consent issue on the specific security paid to Respondent, and

Conflict 2:

Erroneously reversing the Pa. Orphans' Court opinion (which was in conformity with the CFR) for failure to use Pa. MPAA legislation which restricts access to the "joint account" to the non-contributing co-owner.

As such, Pennsylvania's MPAA legislation, per *Free v Bland*, "must yield".

REASONS TO GRANT CERTIORARI

1) *(Per Question I)* **The Uniform Probate Code's "Multiple-Person Accounts" provisions have not been designed, nor appropriate, for adjudicating disputes involving securities.**

a) **Contrary to the Code of Federal Regulation** The U.S. Treasury indicates that the Code of Federal Regulation controls purchases from *TreasuryDirect, (U.S. Treasury Form* 5381 E). Also, as noted in *Bank of America Trust & Savings Assn.* v. *Parnell*, 352 U.S. 29 as quoted in *Free v Bland*, supra, "'Federal law of course governs the interpretation of the nature of the rights and obligations created by the Government bonds themselves."

b) **Contrary to the judicial logic of *Pennsylvania. v Nelson, supra,*** that this Court has used to resolve state law versus federal law issues, such as the one presented to this Court by *Novosielski.*

c) **Contrary to U.S. District Court *Union National Bank of Texas* decision** that opined that U.S. Treasuries are not "accounts" under the Texas' Uniform Probate Code.

d) **Contrary to the drafters of the Uniform Probate Code** that indicated that securities are <u>not</u> to be adjudicated under MPAA.

2) (*Per Question II)* **Pennsylvania's specific MPAA legislation is in conflict with federal law.**

a) **The Pa. Supreme Court failed to answer the primary judicial question required by *Yiatchos v Yiatchos*** regarding whether the individual whose funds were used to purchase the U.S. Treasury security, Mrs. Novosielski, agreed to grant a right of survivorship to the other, surviving co-owner.

Did Mrs. Novosielski consent to grant a right of survivorship in the U.S. Treasury Bill purchased by Respondent on September 27, 2001; "without consulting" Novosielski?

b) PENNSYLVANIA'S MPAA IS IN DIRECT CONFLICT WITH THE CODE OF FEDERAL REGULATIONS regarding access to the security during each co-owners lifetime.

3) Precedent cases with significant errors should not be left undisturbed

Novosielski is the first, and by default, is the precedent case at the state level for litigating U.S. Treasury securities purchased under *TreasuryDirect.*

Both the Uniform Probate Code and Code of Federal Regulations continue to change:

State legislation dealing with joint accounts with a financial institution, and the Code of Federal Regulations dealing with funding of the National Debt, have different, and evolving, goals as reflected in continuing changes to both legislative and regulatory schemes. As such, there is no assurance that the UPC (or any state modification thereto), will be in agreement with the CFR in the future. As such, there is a judicial imperative to vacate *Novosielski* even if no conflict with federal law is deemed to exist at the present time.

Immediate problem in Pennsylvania: Estate attorneys, estate planners and lower courts in Pennsylvania (and other states [36] that might follow) have been placed in an untenable position of being directed by the Supreme Court in their state to view U.S. Treasuries securities as "joint accounts" as defined in the Uniform Probate Code, rather than as marketable securities governed by the Code of

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[36] If *Novosielski* stands, it raises the potential that other states will follow the Pa. decision and litigate U.S. Treasury securities using their respective state MPAA laws. This Court, and no federal court, should be placed in a position to continually review state law that might, or might not, be at variance to federal law.

Federal Regulations promulgated by the U.S. Treasury.

4) *TreasuryDirect* is new, large, and until *Novosielski*, not previously litigated

The U.S. Treasury security was purchased by Novosielski's agent under a relatively new program initiated by the U.S. Treasury Department entitled *TreasuryDirect*. *TreasuryDirect* allows individuals to purchase U.S. Treasuries without using any other financial institution, such as a broker or bank. The program has grown dramatically; currently there are over 500,000 individuals that have invested over $75 billion in U.S. Treasuries. Disputes arising from *TreasuryDirect purchases* should not be controlled by the *Novosielski* decision

5) *Novosielski* carries a potential for fraud

In several states, the transaction executed by Mrs. Novosielski's agent (i.e. purchasing an asset in joint name with a principal using the principal's funds) is simply not allowed.[37] (See *Russ v Russ, 2007*, Supreme Court of Wisconsin, 2007 WI 83; 302

[37] The simple judicial concept used by other states (unfortunately absent in *Novosielski*) is that, because agents have access to their principal's cash, and given the relative ease to create a joint account on the internet with no witnesses; any jointly formed asset between agent and principal triggers a "presumption of fraud" (See *Russ v Russ, supra)*

Wis. 2d 264), *Landin v Lavrisiuk 2005* Ohio 4991 and *Grubb v Grubb 2006*, Supreme Court of Virginia, 272 Va. 45; 630 S.E.2d 746) The Pa Superior court also noted (*at 16*) that the potential for fraud in the U.S. Securities exists under the Pa MPAA framework.[38]

Under *Novosielski*, an individual with a power of attorney in Pennsylvania can initiate the purchase of a U.S. Treasury without even consulting the principal, and the agent has no burden under Pa. MPAA to establish that their principal (now a decedent) "consented", per *Yiatchos* supra, to granting the right of survivorship; a blueprint for fraud.

6) Multiple reasons [39] the actual *Novosielski* decision would reverse in the absence of MPAA

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[38] Petitioner notes that if a prior U.S. Treasury Bill is ever purchased by the principal for any amount, under MPAA the agent can purchase a subsequent Bill for a larger amount without consulting the principal and "consent" will be determined on the first purchase, not the Bill purchased by the agent. Clearly an untenable judicial outcome, precisely why adjudication of any U.S. Treasury security must be on the actual security paid to the surviving co-owner.

[39] Reasons the "consent" of Mrs. Novosielski would be different if the actual T-Bill purchased by Respondent was used to determine Mrs. Novosielski's "consent":

1) **The original Tender was a one year instrument**; The "four corners" of the Tender contract between Mrs.

The multiple reasons (footnote 39) that the *Novosielski* decision would turn if Pa. MPAA was proscribed is provided to illustrate that the use of Pa. MPAA legislation can lead to materially different judicial results.

The judicial question raised by *Novosielski* is not whether the use of a state law, such as Pennsylvania's MPAA, leads to the same judicial conclusion as the use of federal law. Rather, the overriding principle that has been well established (see e.g., *Free v Bland*) is that the rules and regulations developed in regard to the funding of

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Novosielski and the US Treasury is clear; it indicates that the $500,000 was to be returned to her, to an account in her name only, after one year.

2) **Novosielski's mental condition had also significantly deteriorated per trial records.** Novosielski's mental condition at the time of the U.S. Treasury Bill that Proch purchased (the "unilateral T-Bill") is the proper judicial consideration, not "at the time the account was created" per Pa. MPAA.

3) **Burden shifting**: In Pennsylvania (see *Frowen v Blank*, Pa Supreme), a transaction between individuals in a legal defined "confidential relationship" is "prima facie voidable". Without MPAA, it is Proch, not an objector to the transaction, that would have the burden of proof to establish Novosielski's donative intent or "consent"

4) **Beyond the scope of the power of attorney granted**: The agent used his power of attorney to purchase the $500,000 U.S. Treasury without consulting Mrs. Novosielski. The trial record is silent as to whether he had been given such discretionary authority.

our national debt obligations through the issuance of U.S. Treasury securities is the exclusive purview of the U.S. government within the U.S. Department of the Treasury. As such, any state law dealing with the rights and obligations of individuals in their interactions with financial institutions in a particular state cannot be brought to bear on U.S. Treasury securities.

REMEDY SOUGHT FROM THIS COURT

Novosielski demonstrates the wisdom of the *Free v Bland's* Court's decision that, in the area of U.S. Treasury securities, state law "must yield" when such law is "contrary to" or "interferes with" federal law. (See definition of "federal law" as used by petitioner in this brief, page 10)

No federal court should be put into the position that the *Novosielski* decision has placed this Court, i.e., a requirement to review if a particular state law "essentially mirrors" (*Novosielski opinion at pg 11*) applicable federal law when adjudicating a U.S. Treasury dispute.

Petitioner believes that this Court's review of the Pennsylvania Supreme Court's *Novosielski* opinion, warrants the following decisions:

I) The Uniform Probate Code, specifically Article VI, Part 2, "Multiple Person Accounts" was not drafted, nor appropriate, in the adjudication of U.S. Treasury

securities; and, as such, any use of such provisions by a state in the adjudication of U.S. Treasury securities is a *per se* violation of federal law.

II) Pennsylvania's, MPAA legislation, a modified form of the Uniform Probate Code, Article VI, Part 2 "Multiple Person Accounts" has specific conflicts with Federal law, and, per the established principle in *Free v Bland*, Pa.'s MPAA legislation "must yield".

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

_____/s/_____

John A. Modzelewski

October 21, 2010

APPENDIX A:
PA SUPREME COURT *NOVOSIELSKI* OPINION

IN RE: ALICE G. NOVOSIELSKI, DECEASED;
APPEAL OF: THOMAS V. PROCH

No. 35 WAP 2008

SUPREME COURT OF PENNSYLVANIA

992 A.2d 89; 2010 Pa.

March 2, 2009, Argued
March 25, 2010, Decided

PRIOR HISTORY:
Appeal from the Order of the Superior Court entered September 25, 2007 at No. 265 WDA 2007 affirming the Order of the Court of Common Pleas of Westmoreland County entered January 8, 2007 at No. 65-01-2214. Appeal allowed July 15, 2008 at 622 WAL 2007. Trial Court Judge: Daniel J. Ackerman, Judge.

Superior Court Judges: Susan Peikes Gantman, Patrick R. Tamilia, Zoran Popovich, JJ. In re Estate of Novosielski, 2007 PA Super 292, 937 A.2d 449, 2007 Pa. Super.

COUNSEL: For Thomas V. Proch, APPELLANT: Theodore F. Huckestein, Jr., Esq.

APPELLEE: John A. Modzelewski, Executor of the Estate of Helen Modzelski.

OPINION

MR. JUSTICE McCAFFERY

Appellant, Thomas V. Proch, appeals from the order of the Superior Court, which affirmed the decree of the Westmoreland County Orphans' Court, Appellant, as executor of the Estate of Alice G. Novosielski ("Decedent"), to inventory with Decedent's estate the principal and proceeds of a United States Treasury account titled in Appellant's and Decedent's names. Because we conclude that both the Superior Court and orphans' court misinterpreted relevant provisions of the act known as the Multiple-Party Accounts Act ("MPAA"), 20 Pa.C.S. §§ 6301-6306, and failed to properly apply the MPAA's relevant provisions, we reverse.

The relevant factual and procedural history, taken from the decisions below and evidence of record where noted, is as follows. Decedent died testate on November 16, 2001, at the age of 79. Decedent's husband predeceased her in 1998, and the couple had no children. Decedent's will, dated June 12, 1995, provided that in the event her husband predeceased her, her estate would be divided equally among her five sisters, per stirpes. At the time of Decedent's death, only one sister was living, Helen Modzelewski, while others left surviving children.

At some point after she executed her will, Decedent

began experiencing health problems and required assistance with household and personal needs. Appellant, who was the son of Decedent's deceased sister Loretta, began to provide such assistance, along with his wife, beginning in 1995, according to their uncontradicted testimony. Assistance was also provided by caregivers hired by Decedent and supervised by Appellant. On August 25, 2000, Decedent appointed Appellant her attorney-in-fact under a duly executed power of attorney. The power of attorney was drafted by James E. Kopelman, Esq., who later testified at the hearing in this case that he was comfortable with Decedent's decision to execute the power of attorney because he "felt that she had the capacity to do it[,] that she understood what she was signing[,] and that there was no undue influence." Master's Hearing, 11/16/05, at 396. Kopelman further testified that at the time, Decedent was "mentally ... still very, very sharp[,] ... knew what she wanted to do[, and] understood the Power of Attorney... ." Id. at 394.

On September 15, 2000, shortly after she executed the power of attorney, Decedent executed a codicil to her will naming Appellant executor of her estate, appointing an alternative executrix, and granting specific bequests of $ 5,000 to each of these two individuals. In all other respects, the codicil ratified and republished Decedent's 1995 will. The codicil was prepared by Kopelman, who had also prepared the original will.

Four days later, on September 19, 2000, Decedent executed a United States Treasury Bill Tender ("the Tender"), with a non-competitive bid, or offer to buy, of $ 500,000. The Tender further provided that a "Treasury Direct" account was to be created in the account name of "Alice G. Novosielski or Thomas V. Proch." The "Investment Kit" that accompanied the Tender, and which explained the process and ramifications of the investment, indicated that an account in the names of two people joined by the word "or" creates a conclusive right of survivorship. Treasury Direct Investor Kit at 6; Master's Hearing Exhibit 2. Appellant, acting as Decedent's attorney-in-fact, had procured the Tender and Investment Kit in order to consolidate Decedent's several existing financial accounts. Kopelman testified that Appellant had discussed with him the possibility of combining Decedent's various accounts into a Treasury Direct account, and that Kopelman had advised Appellant that he "was on the right track" for two reasons: the relatively low FDIC insured limits on the other accounts, and ease of administration of one account. Master's Hearing, 11/16/05, at 399. Later, the master specifically found as a fact that Decedent had directed Appellant to place the Treasury Direct account in the names of Decedent or Appellant after she had had an opportunity to review the Investment Kit prior to her executing the Tender, including that portion of the Investor Kit explaining the different ways of registering accounts and their ramifications. Master's Report and Recommendation ("Master's

Report"), dated July 7, 2006, at 2.

The Tender had an initial thirteen-week investment term and authorized automatic reinvestment in the bill for the next three succeeding thirteen-week terms, for a total term of one year. At the conclusion of the final thirteen-week investment term, Appellant, acting under the power of attorney, unilaterally authorized a further one-year reinvestment of the account holdings without consulting Decedent. Approximately two months after Appellant reinvested the account holdings for a further one-year term, Decedent died.

On December 11, 2002, Appellant, then acting in his role as executor of Decedent's estate, filed a first and final account of the estate, excluding from the estate's property the value of the Treasury Direct account. Decedent's surviving sister, Helen Modzelewski, filed objections to the account, contending that the Treasury Direct account should be listed as property of the estate. Appellant thereafter filed an amended first and final account of the estate; however, he continued to exclude from it the Treasury Direct account. In the interim, Helen had died, and John Modzelewski ("Appellee"), Helen's son and administrator of his mother's estate, filed objections to Appellant's amended first accounting, raising the additional argument that Appellant had abused his role as attorney-in-fact by misappropriating or misusing approximately $ 90,000 of Decedent's funds.

The orphans' court appointed a special master to take testimony and issue a report and recommendation on the filed objections. Following four days of hearings, during which evidence was admitted concerning Decedent's mental and physical condition prior to, at, and after the execution of the Tender,[1] the master issued a report and recommendation that determined (1) Appellant should be surcharged $ 96,059 because he had breached his fiduciary duty by making various payments from Decedent's funds beyond the powers conferred by the power of attorney and/or for not keeping proper records of these transactions; and (2) Appellant was the sole owner of the Treasury Direct account. Regarding the latter determination, the master found, based on testimony given by Kopelman and other witnesses, that Decedent had possessed the mental acuity to make a knowing execution of the Tender; that "[D]ecedent understood that [Appellant] would be the sole owner of the Treasury Direct account upon her death;" and that "even if the Power of Attorney had established a confidential relationship, [Appellant] has proven by his credible testimony that the creation of the joint Treasury Direct Account was the free, voluntary and intelligently made transfer of [Decedent]." Id. at 2,

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[1] As shall be discussed infra, this evidence revealed that Decedent had suffered from serious mental difficulties of varying kinds the year prior to and the year following the time that she executed the power of attorney, codicil, and the Tender.

21. Appellant and Appellee filed cross-exceptions with the orphans' court. [2]

The orphans' court adopted the master's recommendation in part and reversed in part without making additional findings of fact or specifically rejecting those findings made by the master. The court agreed with the master that Appellant should be surcharged $ 96,059 for questionable or undocumented transfers of funds made pursuant to his power of attorney.[3] However, the court disagreed with the master's conclusion that Appellant, and not the estate, was the owner of the Treasury Direct account.

In arriving at this contrary conclusion, the court considered relevant provisions of the MPAA, in particular, Section 6304(a). That section provides:
(a) Joint account.--Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 6303 (relating to ownership during

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[2] We note that Appellee was represented by counsel at the master's hearing, but thereafter acted pro se.

[3] The issue of the surcharge against Appellant is not on appeal before this Court.

lifetime) augmented by an equal per capita share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.
20 Pa.C.S. § 6304(a) (emphasis added).

The court did not conduct an analysis concerning, or make a conclusive determination as to, whether the Treasury Direct account is a joint account as defined, and thus governed, by the MPAA. Rather, the court determined that even if the Treasury Direct account was governed by the MPAA, clear and convincing evidence of record rebutted the presumption of survivorship. The court reasoned:
Accepting [Appellant's] own testimony, [Decedent's] intent at the time the account was created was that the money would be used for her care, depending on how long she lived. [Appellant] testified that the account was created as an 'interest pump that would supplement [Decedent's] salary [sic] to pay for her care.' The interest earned on the account was automatically deposited to [Decedent's] individually titled National City [Bank] account, and was reported on her tax returns. Pursuant to the terms of the [I]nvestor [K]it, when the securities matured, the funds were to be automatically deposited into [Decedent's] individually titled National City account. The above evidence is sufficient to rebut the survivorship presumption, by clear and convincing evidence, as the account was obviously a 'convenience account' and was not intended as a

present gift of the monies to [Appellant] at the time the account was created.
Orphans' Court Opinion, dated January 8, 2007, at 4-5 (citations to the record and footnote omitted).[4]

Appellant appealed, and the Superior Court affirmed, albeit on different grounds from those of the orphans' court. First, the Superior Court directly addressed the issue of whether the Treasury Direct account was a "joint account" as defined and

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[4] The court also determined that the record failed to support the conclusion that the Treasury Direct account was an inter vivos gift from Decedent to Appellant. Id. at 5-8. The court cited Estate of Buriak, 342 Pa. Super. 371, 492 A.2d 1166, 1168 (Pa.Super. 1985), for the proposition that where a confidential relationship exists between the donee and donor, the burden shifts to the donee to prove by clear and convincing evidence that the conveyance was the free, voluntary, and independent act of the donor. The court determined that Appellant's status as attorney-in-fact, as well as his extensive involvement in the management of Decedent's substantial financial estate and his intimate involvement with Decedent's daily care and comfort, established the existence of such a confidential relationship. The court then concluded that Appellant had failed to prove by the requisite quantum of proof that Decedent had intended to make an inter vivos gift of the Treasury Direct account. The court reiterated its conclusion that the account was merely a "convenience account" for Decedent's care during her lifetime, and further determined that while testimony of record supported the conclusion that Decedent wished Appellant to have the account upon her death, the formal requirements for a testamentary disposition were lacking. Id. at 8. The testimony that the orphans' court was referring to was apparently Appellant's testimony that Decedent had directed him to create the Treasury Direct account in the names of Decedent or Appellant, so that upon her death, the Treasury Direct account would be his. Master's Hearing, 11/14/05, at 79.

governed by the MPAA.[5] The Superior Court noted that "[t]here is no dispute [D]ecedent was a 'depositor' for purposes of the MPAA definition of 'account,' or "that the Federal Reserve Bank responsible for administering [D]ecedent's treasury account is a 'financial institution' for purposes of section 6301." In re Estate of Alice G. Novosielski, 2007 PA Super 292, 937 A.2d 449, 453 (Pa.Super. 2007).[6] Noting that the Treasury Direct account was not "a checking account, saving account, certificate of deposit, [or] share account," as specifically delineated in Section 6301 of the MPAA, the court pursued the next avenue of inquiry, i.e., whether the Treasury Direct account was an "other like arrangement." Id. (quoting 20 Pa.C.S. § 6301). In exploring this issue, the court examined our

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[5] The MPAA defines an "account" as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, saving account, certificate of deposit, share account and other like arrangements." 20 Pa.C.S. § 6301 (emphasis added). The MPAA defines "joint account," in turn, as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." Id.

[6] The MPAA defines "financial institution" as "any organization authorized to do business under State or Federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations and credit unions." 20 Pa.C.S. § 6301. However, we note that the Superior Court's assertion that there is "no dispute" that the Federal Reserve Bank is a "financial institution" for purposes of Section 6301, is belied by Appellee's pro se Superior Court Brief at 34 ("Federal reserve is not an MPAA 'financial institution'... .").

plurality decision in Deutsch, Larrimore & Farnish, P.C. v. Johnson, 577 Pa. 637, 848 A.2d 137 (Pa. 2004) (plurality), wherein this Court determined that a Morgan Stanley/Dean Witter brokerage account was an "other like arrangement" as contemplated by Section 6301 of the MPAA. After examining both the plurality position, authored by former Justice Newman, and the concurring position, authored by Justice Saylor, the Superior Court concluded that under either analysis, the conclusion was inescapable that the Treasury Direct account was "indeed, an 'account' for purposes of the MPAA."[7] Novosielski, supra at 454. Additionally, the Superior Court determined that the Treasury Direct account fit the MPAA definition of "joint account." The court stated: "By virtue of the account being titled with the designation 'Alice G. Novosielski or Thomas V. Proch,' a title that employs the connective 'or,' both [D]ecedent and [A]ppellant had the authority to authorize transactions with the account pursuant to the terms of the [Investor K]it." Id. at 455.

Having determined that the Treasury Direct account was a "joint account" for purposes of Section 6304(a) of the MPAA, the Superior Court "started" with the presumption that the funds in the account belonged to Appellant, citing 20 Pa.C.S. § 6304(a), Jt. St. Govt. Comm. Comment ("The underlying

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[7] We shall discuss infra the analysis of both the Deutsch plurality and concurring opinions in detail.

assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death."). The Superior Court then considered whether Appellee was able to prove by clear and convincing evidence that Decedent had a different testamentary intent when the Tender was executed. 20 Pa.C.S. § 6304(a) ("Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.") (emphasis added).

The Superior Court, in determining that "clear and convincing evidence of a different intent" did exist, focused upon the fact that contemporaneously with the Tender being executed, Decedent had also ratified her 1995 will through the 2000 codicil. The court observed: "The will left approximately one-tenth (1/10) of [D]ecedent's estate to [A]ppellant, which is a far lesser share than the approximate four-fifths (4/5) share [A]ppellant would receive if he were found to be the owner of the treasury account." Novosielski, supra at 457. The court further reasoned:

> When the execution of a valid will pre-dates the creation of a challenged MPAA joint account, we must consider whether the intentions expressed in the will can be read in a manner that is consistent with the decision to place assets in the MPAA joint account. If we cannot find such

> consistency[,] the expression of intent in the will must control unless we determine that the creation of the joint account functions as a revocation of the validly executed will. Id. (emphasis added; footnote omitted).

In essence, the Superior Court felt compelled to read the provisions of the MPAA in pari materia with those of other sections of the Probate, Estates, and Fiduciaries ("PEF") Code regarding the creation and revocation of wills. Id. "To apply the [MPAA joint account] ownership presumption would be, for all practical purposes, to use section 6304(a) to revoke the prior will in a manner not contemplated by our statutory scheme." Id. The court observed:

> We must give effect to the will. To conclude otherwise would lead to the frustration of testamentary intent and could result in fraud. Decedent's 1995 will and the 2000 codicil are precisely the form of clear and convincing evidence section 6304(a) contemplates a challenger must produce in defeating the presumption of ownership of a joint account. By its very nature, a validly executed will is the clearest and most convincing evidence of a decedent's intent that can be produced. Id.

The Superior Court then set forth its own assessment of what had transpired between Appellant and Decedent, characterizing Appellant as an "opportunist who abused his position as

[D]ecedent's attorney-in-fact,"[8] who had given the Tender and Investment Kit to Decedent when she was enfeebled with "a perilous mental condition." Id. at 458. In arriving at this latter conclusion, the Superior Court disregarded the master's factual findings, undisturbed by the orphans' court, that Decedent had been mentally competent and sharp at or near the time she had executed the Tender in September 2000. Rather, the Superior Court observed that evidence of record purportedly showed that Decedent had "been diagnosed with being in an acute confusional state replete with hallucinations, delusional disorder, and with psychotic depression by a clinical psychologist in October of 1999, which degenerated into senile dementia by September 2001." Id. (citing evidence of record). The Superior Court, without citing to any evidence of record, also stated that Appellant "executed the treasury account tender with his own hand, and excluded other members of the family and heirs under the 1995 will and 2000 codicil from the management of [D]ecedent's day to day affairs." Id. [9]

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[8] This characterization was based upon the fact that Appellant had been surcharged $ 96,059 for questionable or undocumented transfers of funds made pursuant to his power of attorney.

[9] The Superior Court did not appear to draw any further conclusions from its statements. It then simply came to its conclusion that the orphans' court had reached the correct legal result "even though it fail[ed] to take the most direct analytical route." In re Estate of Alice G. Novosielski, 2007 PA Super 292, 937 A.2d 449, 458 (Pa.Super. 2007).

However, no factual findings or comments by either the master or the orphans' court support the assertions that Decedent was not mentally competent at the time she executed the Tender, that Appellant had actually written Decedent's signature on the Tender, or that Appellant had excluded other family members and heirs from Decedent's daily life. In fact, the master's factual findings, undisturbed by the orphans' court, lead to a contrary conclusion on these matters. Moreover, there exists evidence of record contrary to the "observations" of the Superior Court as to these matters; thus, the Superior Court's assessments were not based on undisputed evidence.

We granted Appellant's Petition for Allowance of Appeal to address the following issues:

(1) By applying state law to override federal treasury regulations, is the Superior Court's award of the joint treasury account to the decedent's estate precluded by the Supremacy Clause of the United States Constitution?

(2) Did the Superior Court err in holding that the presumption of survivorship under 20 Pa.C.S.A. § 6304(a) is defeated, per se, if the joint account results in an allocation of the estate that is inconsistent with an existing will?

(3) Did the Superior Court err in determining, under 20 Pa.C.S.A. § 6304(a), that there was clear and convincing evidence of a different intent at the time the account was created?

(4) Did the Superior Court err in failing to accord the factual findings of the master the same weight and effect as a jury verdict?

Preliminarily, and with due regard to the parties who were asked to brief and argue this issue, we conclude that the first issue must be dismissed as having been improvidently granted. Evidently, the issue as stated assumes a circumstance that had never occurred. No court below "overrode" purportedly applicable federal treasury regulations by applying state law in their stead, for the simple reason that the parties never invoked federal regulations in their arguments and the courts did not raise the issue sua sponte. Neither Appellee in his exceptions to the master's report,[10] nor Appellant in his appeal from the decree of the orphans' court, raised an issue regarding the applicability of federal treasury regulations in any capacity or guise.[11] No

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[10] Appellee states in his pro se brief, without citation to the record, that he has "consistently argued" that the MPAA cannot be applied to a United States Treasury security and that the application of the MPAA to the Treasury Direct account in this case is a Supremacy Clause violation. Appellee's Brief at 9 n.8. However, as previously stated, Appellee never raised this issue in his exceptions to the master's report. Further, although Appellee in his pro se brief before the Superior Court did that the MPAA did not apply to the Treasury Direct account, Appellee did not set forth a Supremacy Clause argument, nor did he cite to any purportedly applicable federal regulations. See Appellee's Superior Court Brief at 34.

[11] Appellant first raised this claim in his Petition for Allowance of Appeal. In his Superior Court brief, Appellant argued that the Treasury Direct account was governed by the

mention of federal treasury regulations occurred in the respective decisions of the master, orphans' court, and Superior Court. Thus, the issue also suffers from the impediment of having been apparently waived. See Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.").

We have found support from at least one other jurisdiction for the proposition that a claim of state law preemption by federal law is of such fundamental importance that it may be considered for the first time on appeal. Oatts v. Jorgenson, 821 P.2d 108, 112 (Wyo. 1991). However, unless Congressional legislation has explicitly preempted state law or implicitly intended to occupy the relevant field to the exclusion of state law, federal preemption occurs only where a state law actually conflicts with federal law. Dooner v. DiDonato, 601 Pa. 209, 971 A.2d 1187, 1193-94 (Pa. 2009); Cellucci v. General Motors Corp., 550 Pa. 407, 706 A.2d 806, 809 (Pa. 1998). State law may be displaced under conflict preemption principles when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Jones v. Rath Packing Co., 430 U.S. 519, 526, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977). "This inquiry requires us to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are

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MPAA. See Appellant's Superior Court Brief at 35-42.

written." Id.

Here, the parties have not argued that Congressional legislation has explicitly preempted the MPAA or implicitly intended to occupy the relevant field to the exclusion of the MPAA. Further, the federal regulations that appear to be applicable to this matter do not pose a conflict with the MPAA with respect to the issue of right of survivorship. The MPAA relevantly provides: "Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created." 20 Pa.C.S. § 6304(a). This result is essentially mirrored in 31 C.F.R. § 357.21, a federal regulation pertaining to Treasury Direct accounts, which provides that when a security is registered in the names of two individuals joined by the word "or," it creates a conclusive right of survivorship.[12] Case law indicates that the conclusive right of survivorship may be defeated by a showing of fraud or breach of trust. Yiatchos v. Yiatchos, 376 U.S. 306, 84 S. Ct. 742, 11 L. Ed. 2d 724 (1964); Free v. Bland, 369 U.S. 663, 82 S. Ct. 1089, 8 L. Ed. 2d 180 (1962) (both pertaining to regulations that created a right of survivorship in

[12] As previously noted, the information set forth in the Investment Kit explains that accounts in the name of two persons connected by the word "or" creates a "conclusive" right of survivorship and, thus, as a practical matter, the effect of the regulation is evident in the record.

United States savings bonds). Because of our ultimate determination that Appellant is the sole owner of the Treasury Direct account under Section 6304(a) of the MPAA, there is no conflict with 31 C.F.R. § 357.21, which would require the same result. [13] Moreover, there exists a presumption against federal preemption of state law. Dooner, supra at 1194; Altria Group, Inc. v. Good, U.S. , , 129 S.Ct. 538, 543, 172 L. Ed. 2d 398 (2008). The historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. Dooner, supra. With this principle in mind, and because the parties have failed to set forth an argument that would compel the application of federal preemption in this matter, an issue waived below, we dismiss the first stated issue as having been improvidently granted. Moreover, our ultimate disposition of the next two issues obviates our need to address the final issue accepted for review, concerning whether a master's factual findings are the equivalent of a jury verdict. Thus, we shall also not address issue four. We thus proceed to address issues two and three, in turn. Because the resolution of these issues concerns questions of law, our standard of review is de novo and our scope of review is plenary. In re Milton Hershey School, 590 Pa. 35, 911 A.2d 1258, 1261

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[13] Although Appellee argues that the record supports a finding of fraud (see Appellee's Brief at 12-14), no such finding was made below, nor was there any finding regarding a breach of trust with respect to the creation of the Treasury Direct account.

(Pa. 2006).

Issues two and three involve whether the Superior Court properly interpreted the MPAA. Before we can resolve these issues, we must first determine whether the Superior Court correctly concluded that the Treasury Direct account is a "joint account" governed by the MPAA, a conclusion that, contrary to language found in the Superior Court opinion, Appellee has disputed and continues to dispute.

The MPAA defines "account" as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, saving account, certificate of deposit, share account and other like arrangements." 20 Pa.C.S. § 6301. A "joint account" is defined as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." Id. "Financial institution" is defined as "any organization authorized to do business under State or Federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations and credit unions." Id.

In Deutsch, supra, a plurality and concurrence of this Court, constituting a majority of the Court, determined that a joint Morgan Stanley/Dean Witter brokerage account was a joint account as defined by the MPAA. In coming to this conclusion, both the

plurality and concurrence noted that the MPAA's definitions of "account" and "financial institution" are very broad. See id. at 141-42 (plurality decision); and 144-45 (Saylor, J. concurring). The plurality determined that the brokerage account was encompassed within the statutory definition of "share account and other like arrangements." Id. at 141 (quoting 20 Pa.C.S. § 6301). Further, the plurality observed that the MPAA's broad definition of "financial institution" included brokerage firms, particularly as some state and federal statutes specifically include brokerage firms within their definitions of "financial institutions." Id. at 142. The concurrence determined that the characteristics of the brokerage account were more similar to those of a traditional "bank account" rather than a "share account." Id. at 144-45. The concurrence additionally observed that the record showed that the brokerage firm provided a wide range of financial services, thus supporting the conclusion that it was a "financial institution" as defined by the MPAA. Further, the concurrence noted that because the MPAA so broadly defined "financial institution," whereas in other statutes the General Assembly had provided a more restrictive definition of "financial institution," it was "at least arguable that the more open-ended definition contained in the [MPAA] was intended to sweep more broadly." Id. at 146. Moreover, as the plurality observed, the broad definitions encompassed by the MPAA established that "virtually all 'fund deposit' transactions with 'financial institutions' doing business pursuant to

state and federal laws are affected by the MPAA." Id. at 140 (plurality decision) (emphasis added).

The task of determining whether the Treasury Direct account at issue in this case falls within the ambit of the MPAA would appear to be considerably less difficult than the determination of whether a brokerage account falls within it. Here, there was clearly a "deposit of funds" made by Decedent that, in turn, created an "account." As the Superior Court correctly noted, the record showed that although Decedent's investment was in a United States Treasury Bill, that bill was neither presented to the two account holders nor titled in their names. Rather, the bill generated income that was, by direction, paid into a bank account held by Decedent, and upon termination of the Treasury Direct account, the principal and remaining interest would be returned to Decedent. Novosielski, supra at 455. Thus, the Treasury Direct account bore some resemblance to a "certificate of deposit," in that it was a timed renewable investment, and we have no hesitation in concluding that the Treasury Direct account was an "other like arrangement" as contemplated by the MPAA. See 20 Pa.C.S. § 6301; see also Deutsch, supra (Saylor, J. concurring) (concluding that an "account" that bears resemblance to a bank account falls within the MPAA's definition of "account"); and Balazick v. Ireton, 518 Pa. 127, 541 A.2d 1130, 1132 (Pa. 1988) (repurchase agreements designed to provide for the parents' lifetime support with a right of survivorship

in their children and titled in the name of the respective parent "or" the respective child, "was not unlike a share account or certificate of deposit" and was, thus, a "joint account" as defined by the MPAA).

Furthermore, there would seem to be no question that the area Federal Reserve Bank that held the Treasury Direct account is a "financial institution" as defined by the MPAA. The Federal Reserve Act's definition of "bank" includes the Federal Reserve Banks. 12 U.S.C. § 221. The powers conferred upon Federal Reserve Banks include "all powers specifically granted by the provisions of [the Federal Reserve Act] and such incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by [the Federal Reserve Act]," as exercised through their "board[s] of directors, or duly authorized officers or agents." 12 U.S.C. § 341 (Seventh). "The [twelve area] Federal Reserve Banks were established by Congress in 1913 to be the monetary and fiscal agents of the United States. To aid in achieving Congress's goal of insulating them from political pressure, the Federal Reserve Banks are formed as corporations. Within their respective designated territories, the Federal Reserve Banks supervise and maintain the nation's banking system, examine the national and state banks that have purchased memberships in the Federal Reserve System, and clear checks and deposits between depository institutions." Fasano v. Federal Reserve Bank of New York, 457 F.3d 274,

277 (3d Cir. 2006) (citations, quotation marks, and footnote omitted).

The Federal Reserve Bank is plainly an "organization authorized to do business under ... Federal law[] relating to financial institutions," and is, in fact, a bank. See 20 Pa.C.S. § 6301. Thus, it is a "financial institution" as defined by Section 6301 of the MPAA. Moreover, there appears to be absolutely no dispute that the Treasury Direct account at issue here was "an account payable on request to one or more of two ... parties whether or not mention is made of any right of survivorship." Id. (defining "joint account"). Accordingly, we conclude that the Treasury Direct account, meeting the MPAA's definition of "joint account," is governed by the provisions of the MPAA. Thus, we now proceed to address the second issue accepted for review: "Did the Superior Court err in holding that the presumption of survivorship under 20 Pa.C.S.A. § 6304(a) is defeated, per se, if the joint account results in an allocation of the estate that is inconsistent with an existing will?"

Section 6304(a) of the MPAA would grant to Appellant the right to survivorship in the Treasury Direct account "unless there is clear and convincing evidence of a different intent at the time the account is created." 20 Pa.C.S. § 6304(a). Our seminal question, therefore, is whether the Superior Court erred by concluding that the provisions of Decedent's will, together with Decedent's ratification of that

will by codicil near the time of the creation of the Treasury Direct account, constituted clear and convincing evidence that Decedent did not intend there to be a right of survivorship at the time the account was created. The Superior Court stated that in order to analyze whether "clear and convincing evidence of a different intent" existed, it was necessary to "consider whether the intentions expressed in [a pre-existing] will can be read in a manner that is consistent with the decision to place assets in [an] MPAA joint account," giving primacy to the will should there be any "inconsistency." Novosielski, supra at 457. We conclude that the Superior Court erred.

There is no statutory provision giving a will primacy over the right of survivorship presumed by Section 6304(a), nor does anything in the MPAA or the PEF Code support the Superior Court's path of interpretation. Indeed, the MPAA clearly evinces a legislative intent that joint accounts are to be generally governed and interpreted separate and apart from provisions governing wills. Section 6306 of the MPAA provides: "No transfer resulting from the application of section 6304 (relating to right of survivorship) shall be considered as testamentary or subject to Chapter 21 (relating to intestate succession) or Chapter 25 (relating to wills)." 20 Pa.C.S. § 6306 (emphasis added). The comment to section 6306 provides:

This section is derived from Section 6-106 of the Uniform Probate Code. The Commissioners'

comment to that section states, in part, that:

> The purpose of classifying the transactions contemplated by [this chapter] as nontestamentary is to bolster the explicit statement that their validity as effective modes of transfers at death is not be determined by the requirements for wills. The section is consistent with [existing law].
> 20 Pa.C.S. § 6306, Jt. St. Govt. Comm. Comment 1976 (emphasis added).

Further, Section 6304(d) provides: "Change by will prohibited.--A right of survivorship arising from the express terms of an account or under this section, or a beneficiary designation in a trust account cannot be changed by will." 20 Pa.C.S. § 6304(d). It is unclear whether Section 6304(d) refers only to wills made subsequent to the creation of the joint account, or whether it encompasses wills made both prior and subsequent to the creation of the account. If it encompasses wills made both prior and subsequent to the creation of the account, then the Superior Court's holding is plainly contrary to statute. However, even if Section 6304(d) applies only to wills made subsequent to the creation of joint accounts, this section only reinforces the conclusion that the legislature did not intend that the MPAA be read to conform to the provisions in the PEF Code governing wills.[14] On the contrary, the MPAA rather

[14] The Superior Court opinion discusses neither Section 6304(d) nor 6306.

clearly evidences a legislative intent that, except when the instrument explicitly provides to the contrary or in the unusual case based on a heightened degree of evidence, individuals and institutions may safely rely upon the presumed right of survivorship of MPAA joint accounts.

We do not hold that provisions of a will, in the appropriate case and in conjunction with other relevant evidence, are beyond consideration as "clear and convincing evidence" of intent different from a right to survivorship "at the time [a joint] account is created." However, the Superior Court's conclusion that such clear and convincing evidence exists simply when a court determines that the provisions of a pre-existing will indicate a distribution scheme in conflict with one under a co-existing joint account is not supportable under a plain reading of the MPAA or otherwise. [15]

As we held in a case wherein we were asked to determine whether a decedent's actions prior to death destroyed a right of survivorship established in a joint bank account:

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[15] We additionally note that the Superior Court failed to give weight to various circumstances consistent with the statutory presumption of a right of survivorship. The Superior Court indicated that courts should not consider proofs tending to bolster such presumption in assessing whether an intent contrary to right of survivorship has been proven by clear and convincing evidence. See Novosielski, supra at 456. We reject this premise, as it would encourage courts to disregard potentially relevant evidence.

HN12 A joint tenancy with right of survivorship having been created and not terminated at the death of one tenant, the law is too well settled to be gainsaid. The Orphans' Court properly held that the funds passed outside the estate to the party having the right of survivorship.
Estate of Allen, 488 Pa. 415, 412 A.2d 833, 838 (Pa. 1980) (footnote omitted).

Further, as we more recently stated:
One who knowledgeably creates a joint account with another arguably does so with the present intent to employ the account's survivorship characteristic in substitution for a testamentary device. Furthermore, accounts with right of survivorship provisions are often set up to allow caretakers to assist senior citizens with the management of their finances. [16] Their well-planned financial protection can best be honored by adhering to the statutory presumption[s]... . Like other testamentary devices, creation of a joint account, without more, accomplishes no present transfer of title to property. If, as in this case, one person deposits all sums in the joint account, this arrangement contemplates transfer of title to those funds to the other person or persons named on the account upon the death of the depositor. Moreover, the creator of a joint account, like the maker of a will and unlike the giver of a gift, may change his or her mind prior to death.

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[16] This is precisely what had happened in the case sub judice.

Deutsch, supra at 143-44 (plurality). [17]

The latter point made by the plurality in Deutsch is significant. It is axiomatic that an individual may generally use and dispose of his or her property as he or she wishes. Thus, a beneficiary would typically have no valid claim against a third person should a decedent reduce the estate during the decedent's lifetime by bestowing upon that third person the decedent's possessions. That is what essentially happened in this case. Decedent reduced the extent of her property (significantly) by placing $ 500,000 of her assets in the Treasury Direct account and, by the manner of titling the account, created a right of survivorship in Appellant. Had Decedent lived longer, the proceeds of the Treasury Direct account presumably would have been depleted by expenditures for her care. As it happens, she died just slightly more than one year after creation of the account, leaving the bulk of the account intact. Rather than focusing upon the fact that Decedent had died with a substantial portion of her property

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[17] See also 20 Pa.C.S. § 6303, Jt. St. Govt. Comm. Comment--1976 ("The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.") (quoting the Commissioners' comment to Section 6-103 of the Uniform Probate Code and quoted in Deutsch, supra at 143 (plurality)).

passing directly to Appellant, the Superior Court should have simply determined whether the account by its own terms, and without clear and convincing evidence of a contrary intent, created a right of survivorship. We therefore hold that the Superior Court erred by concluding that a right of survivorship created by a joint account governed by the MPAA is defeated merely because provisions of a will would distribute a decedent's property in a different manner.

We thus move to the third issue accepted for review, i.e., whether the lower courts erred in concluding that there was any manner of clear and convincing evidence of a different intent than one of right of survivorship at the time the Treasury Direct account was created. As we have just concluded, it was inappropriate for the Superior Court to use Decedent's will, as well as the fact of her subsequent ratification of the will, as the "clear and convincing evidence" required by Section 6304(a) to establish an intent other than one of right of survivorship. However, the Superior Court also either articulated an alternative basis for its holding or focused on other grounds in justifying its conclusion that the provisions of Decedent's will defeated Appellant's right of survivorship in the Treasury Direct account. Specifically, the Superior Court engaged in a discussion concerning Decedent's purported "perilous mental condition" and Appellant's role as "an opportunist" who stood in a confidential relationship with Decedent. Novosielski, supra at

458. [18]Whether the court was embarking on alternative grounds for its holding, or whether it was simply illustrating what it deemed to be "the problems that could arise if [courts] were to ignore valid wills executed prior to the creation of challenged MPAA accounts by blindly deferring to the [S]ection 6304(a) ownership presumption" (id. at 457; emphasis added), our conclusion remains the same. The Superior Court inappropriately engaged in fact-finding.

Although there is evidence in the record concerning Decedent's psychiatric history in the form of medical records, [19] the Superior Court's statement that Decedent was in a "perilous mental condition" directly conflicts with the master's factual finding, left undisturbed by the orphans' court, and based on testimony taken at the hearing and found credible, that Decedent possessed the mental sharpness to make a knowing execution of the Tender. Master's Report at 13. [20] In his pro se exceptions to the

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[18] Curiously, the Superior Court failed to notice the glaringly irreconcilable conflict in its reasoning. If, as the Superior Court speculates, Decedent was in a "perilous mental condition" when she created the Treasury Direct account, then almost certainly she would have been in the same condition four days earlier when she executed the codicil upon which the Superior Court relied, in part, to show clear and convincing evidence of an intent different from right of survivorship.

[19] No mental health professional and no medical professional testified at the hearing.

[20] Further, although the Superior Court cites to medical documents of October 1999 and September 2001, the Superior Court does not mention those medical records closest in time to

Master's Report, Appellee stated that the Master's Report "failed to state" the contents of unspecified medical records concerning Decedent's psychiatric condition, comments made by Appellant concerning Decedent's condition, and findings concerning Decedent's physical condition. [Appellee's] Exceptions to Master's Report at 6. Although Appellee did not specifically state as much, it appears that he was arguing that the master capriciously disregarded evidence concerning Decedent's mental condition; however, Appellee failed to contend that this evidence amounted to "clear and convincing evidence" of Decedent's incapacitated mental state at the time of the creation of the Treasury Direct account. Moreover, Appellee failed to set forth any argument as to how exactly the Master erred by relying on eyewitness testimony concerning Decedent's mental state contemporaneous with the creation of the Treasury Direct account in September 2000, rather than on medical records from either 1999 or 2001, and why the orphans' cou[illegible]s required to overturn the

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when Decedent created the Treasury Direct account in September 2000. Those records show that although Decedent suffered at that time from a major depression and a change in cognitive skills, of which she was aware, she was nevertheless "[a]lert and oriented to time, place and person." Psychiatric Consultation of R.S. Sandhu, M.D., dictated July 14, 2000, at 1. There was no finding of psychosis or senility at the time of this evaluation, and the psychiatric consultation was apparently made in connection with Decedent's hospital admission to treat weakness and diarrhea. Id.; see also Medical Notes of S.S. Bajwa, M.D., dated August 9, 2000 and October 9, 2000, which note Decedent's history of psychosis but show no then-present complaints or findings regarding a mental disability.

master's credibility determinations. Notably, the orphans' court, in its adjudication, made no finding and engaged in no discussion concerning Decedent's mental condition, and did not overturn the master's finding regarding Decedent's mental state at the time of the creation of the Treasury Direct account.

"Absent extraordinary circumstances, an appellate court will not substitute its judgment for that of the fact-finder." Commonwealth v. Johnson, 600 Pa. 329, 966 A.2d 523, 526 (Pa. 2009); see also Department of Transportation, Bureau of Traffic Safety v. O'Connell, 521 Pa. 242, 555 A.2d 873, 876 (Pa. 1989) (concluding that an appellate court exceeds its scope of review when it chooses to accept and reject portions of the record and, in effect, makes its own findings of fact). Because the master, based on testimony he found to be credible, here determined that Decedent was mentally capable of establishing the Treasury Direct account at the time of its creation, and in the manner that she had, and because the orphans' court did not disturb the master's relevant findings or determination, it was improper for the Superior Court to "find" that Decedent suffered from mental confusion and thus conclude that the Treasury Direct account's right of survivorship must be set aside for that reason. [21]

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[21] We need not, and do not, decide at this time to what extent the mental state of a holder of an account governed by the MPAA can establish the clear and convincing evidence necessary to defeat the presumed right of survivorship created by Section 6304(a).

We turn next to the reasons the orphans' court set forth for determining that clear and convincing evidence of an intent other than right of survivorship existed. The orphans' court determined that because the Treasury Direct account "was obviously a 'convenience account' [intended for Decedent's care during her lifetime] and ... not intended as a present gift of the monies to [Appellant] at the time the account was created," the presumption of a right to survivorship was rebutted by clear and convincing evidence. Orphans' Court Opinion at 5 (emphasis added).

The reasons given by the orphans' court are wholly at odds with the MPAA and our interpretation of its provisions. First, the MPAA makes clear that joint accounts with a presumed right of survivorship are not treated as inter vivos gifts from one account holder to another. Rather, the MPAA plainly provides: "A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent." 20 Pa.C.S. § 6303(a). As the official comment to Section 6303 states:

The theory of these sections is that the basic relationship of the parties is that of individual ownership of values attributable to their respective deposits and withdrawals; the right of survivorship which attaches unless negated by the form of the account really is a right to the values theretofore

owned by another which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.20 Pa.C.S. § 6303(a), Jt. St. Govt. Comm. Comment--1976 (quoting the Commissioners' comment to Section 6-103 of the Uniform Probate Code) (emphasis added). Thus, the focus of the MPAA with respect to joint accounts is not whether the creator of the account intended a "present gift" of monies, but whether the account created a right of survivorship.

Second, as we stated in Deutsch, joint accounts with rights of survivorship are typically created as "convenience accounts" to allow caretakers to assist senior citizens with the management of their finances. "Like other testamentary devices, creation of a joint account, without more, accomplishes no present transfer of title to property. If ... one person deposits all sums in the joint account, this arrangement contemplates transfer of title to those funds to the other person or persons named on the account upon the death of the depositor. Moreover, the creator of a joint account, like the maker of a will and unlike the giver of a gift, may change his or her mind prior to death." Deutsch, supra at 144 (plurality; emphasis added). [22] In Deutsch, we

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[22] The plurality also noted that joint accounts with a right of survivorship are sometimes known as "poor man's wills." Deutsch, supra at 142. That is, "joint accounts provide a simple and inexpensive method of passing funds in the account from a deceased joint owner to the surviving joint owner, avoiding the

determined that, pursuant to Sections 6303 and 6304(a) of the MPAA, where a joint account was established solely by the funds of one of the two owners of the account, a creditor of the other owner had no right of execution against the account, as the non-contributing owner had no right of ownership in the account funds until the death of the contributing owner. The analysis of the orphans' court, which focused upon whether there was evidence of an inter vivos gift, was clearly contrary to the provisions of the MPAA and the holding in Deutsch.

As the Superior Court and orphans' court each followed erroneous paths in their search for clear and convincing evidence of intent different from right of survivorship, we now examine whether the parties have raised any different, relevant arguments affecting this issue. Distilled to its essence, and setting aside those arguments that we have already directly rejected, Appellee's pro se brief contends that clear and convincing evidence of intent different from right of survivorship rests on (1) Appellant's purported failure to show Decedent's "donative intent," which Appellee contends amounts to a "constructive fraud" perpetrated by Appellant; (2) the fact that the Treasury Direct account was created "in secret," without family witnesses or an attorney present; and (3) the contention that the record shows that Appellant exerted "undue influence" over Decedent. See generally Appellee's

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necessity of probate." Id. at 142-43.

Brief at 13-44.

The problems with these arguments are many, not the least of which is that they are contradictory to relevant findings of fact and rest on the erroneous conclusion that Appellant had the burden to come forward with additional evidence to show that the Treasury Direct account, which on its face established a right of survivorship, reflected Decedent's intent that Appellant should own the remainder of the account upon Decedent's death. Certainly, had the evidence established that Appellant fraudulently had caused the joint account to be created or had "forged" Decedent's signature, as Appellee appears to suggest without directly stating, [23] then such "facts" would certainly serve to override the provisions of Section 6304(a) of the MPAA, as well as the clear expression of the account itself. However, the orphans' court made no such findings. The master determined that the Treasury Direct account was legitimately created, and the orphans' court not only left that finding undisturbed, but relied on the fact of the account's legitimacy when it determined that the account was created as a "convenience account" for Decedents' care during her lifetime. Further, there was no factual finding that Appellant exerted undue influence in the creation or titling of the account. In fact, the master found that Appellant had not exerted undue influence, a finding that the orphans' court, again,

[23] See Appellee's Brief at 29.

did not disturb. [24]

In order that financial institutions have the certainty and regularity required for the general course of human commerce, the General Assembly enacted the PEF Code, and, relevant to the present case, the MPAA. Rather than allowing certain property to be subject to the protracted resolution of family disputes, as illustrated by the conflict between Appellant and Appellee, [25] the General Assembly established that joint accounts enjoy the presumption of a right of survivorship, absent "clear and convincing evidence" of a contrary intent. "Clear and convincing evidence" requires:

[that t]he witnesses must be found to be credible[;] that the facts to which they testify are distinctly remembered and the details thereof narrated exactly and in due order[;] and that their testimony is so clear, direct, weighty, and convincing as to enable

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[24] With respect to Appellee's assertions that the Treasury Direct account was improperly created because it was done in "secret," it is axiomatic that the PEF Code does not require that wills or joint accounts be signed or created in public ceremonies for the satisfaction of potential beneficiaries.

[25] Appellant and Appellee each presented evidence at the master's hearing setting forth their conflicting stories. Appellant gave the story of himself, the child of Decedent's favorite sister, and his wife, exerting efforts to care for Decedent when no other family members did so, in order to fulfill Decedent's wishes of remaining in her house with her pets rather than being placed in a care facility during her last years. By contrast, Appellee gave the story of Decedent as an aunt who loved all of her sisters and, according to the expressions set forth in her will, desired that they or their surviving children share equally in her substantial estate.

the trier of fact to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. It is not necessary that the evidence be uncontradicted provided it carries a clear conviction to the mind or carries a clear conviction of its truth.
In re Adoption of J.J., 511 Pa. 590, 515 A.2d 883, 886 (Pa. 1986) (quoting LaRocca Trust, 411 Pa. 633, 192 A.2d 409, 413 (Pa. 1963); internal quotation marks omitted); see also Lessner v. Rubinson, 527 Pa. 393, 592 A.2d 678, 681 (Pa. 1991). [26]

Here, because the account was titled in the names of Decedent "or" Appellant, the Treasury Direct account established a right of survivorship. Thus, more than a presumption of a right of survivorship existed; rather, based on its own terms and the explanation set forth in the Investor Kit, the account proclaimed a conclusive right of survivorship. Pursuant to Section 6304(a), it was Appellee's burden to come forth with evidence "so clear, direct, weighty, and convincing" that the fact finder could, without hesitation, come to a clear conviction that Decedent, in fact, had not intended that there be a right of survivorship, despite the manner in which the account was held. Appellee's contentions of fraud and undue influence did not prevail below. Further, Appellee failed to present any evidence "so clear, direct, weighty, and convincing" that the fact-finder could come, without hesitation, to a clear conviction

[26] We note that the clear and convincing evidence standard is also required to prove a claim against a decedent's estate. See Estate of Allen, supra at 836.

that a right of survivorship was not intended by Decedent.

We understand Appellee's disappointment, and we note the orphans' court and Superior Court's apparent discomfort with the master's conclusion that the proceeds of the Treasury Direct account, representing the bulk of Decedent's substantial property, belonged to Appellant rather than to the estate.[27] However, Decedent was wholly within her right to do with her property as she wished during her life, including placing the bulk of her property in a joint account with a right of survivorship. Absent a finding based on clear and convincing evidence that the account was fraudulently created, or accomplished through a breach of trust of the attorney-in-fact who had aided in the creation of the account, the lower courts were simply required to apply the MPAA to resolve the dispute. Because the lower courts erred in their interpretation of the MPAA and failed to properly apply its provisions, and because no clear and convincing evidence of an intent contrary to right of survivorship is evident in the record, we must reverse.

The order of the Superior Court is reversed, and this

[27] However, it is once again worth noting that had Decedent lived for many more years, the Treasury Direct account would presumably have become significantly depleted, leaving Appellant with far less pursuant to his right of survivorship, had he, in fact, survived her. To some extent, the existence of this lawsuit is grounded on the circumstance that Decedent happened to have died before she spent or gave away, as was her right, a substantial portion of her property.

case is remanded to the orphans' court for treatment consistent with this opinion.

Former Justice Greenspan did not participate in the decision of this case.

Mr. Chief Justice Castille, Messrs. Justice Saylor, Eakin and Baer, and Madame Justice Todd join the opinion.

APPENDIX B:
PA SUPERIOR COURT *NOVOSIELSKI* OPINION

J. A28020/07
2007 PA Super 292

IN THE SUPERIOR COURT OF PENNSYLVANIA

In Re: Estate of Alice G. Novosielski, Deceased
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APPEAL OF:
THOMAS V. PROCH : No. 265 WDA 2007
Appeal from the Decree entered in the
Court of Common Pleas of Westmoreland County,
Civil Division, No(s): 65 01 2214

BEFORE: GANTMAN, TAMILIA and POPOVICH, JJ.
Petition for Reargument Filed October 9, 2007

OPINION BY TAMILIA, J.: Filed: September 25, 2007
Petition for Reargument Denied December 4,2007

¶ 1 Thomas V. Proch appeals from the January 8, 2007, Decree ordering him, *inter alia*, to inventory, within the Novosielski estate, the principal and proceeds of a treasury account titled in his and decedent Alice G. Novosielski's names.

¶ 2 On June 12, 1995, decedent duly executed a last will and testament bequeathing her substantial estate, in the event her husband predeceased her, *per stirpes* to two living siblings and the children of

three other predeceased siblings. Record, No. 62, Objectors' Exhibits, Exb. H. At some point within the next few years, decedent began to experience health problems and required increased assistance in accomplishing every day tasks.

¶ 3 On August 25, 2000, decedent granted appellant a power-of-attorney. Immediately, appellant undertook a consolidation of decedent's assets. N.T., Master's Hearing Vol. 1, 11/14/05, at 70. This consolidation entailed transferring the assets held in a number of accounts to a single account with National City Bank of Pennsylvania. *Id.* at 70-71. Once the consolidation was complete, appellant began to explore various methods of investing the assets in the consolidated account. *Id.* at 72.

¶ 4 On September 15, 2000, decedent executed a codicil to her 1995 will. The codicil named appellant as the executor of her estate; provided for two $5,000 bequests—with appellant the named beneficiary of one of these bequests; and ratified and republished her 1995 will "in all other respects." Record, No. 63, Respondent's Exhibits, Exb. 5, First Codicil. Four days later, on September 19, 2000, the decedent executed a Treasury Bill, Note & Bond Tender (tender). Record, No. 62, Objectors' Exhibits, Exb. L. The tender was executed during a meeting between decedent and appellant with no other relatives or parties present and it was drafted by appellant. N.T., Master's Hearings, Vol. 2, 11/15/05, at 300. The tender was signed by the decedent and dated by appellant. N.T., Master's Hearing Vol. 1, at 77.

¶ 5 The tender authorized the issuance of a one-time $500,000 payment from the decedent's National City

Bank account to be used for the purchase of a 13-week treasury bill that was to be held on account with a Federal Reserve Bank. Record, No. 62, Objectors' Exhibits, Exb. L. The tender further authorized three 13-week automatic subsequent and sequential reinvestments. *Id.* At the end of the investment period, or any extension thereof, the principal and interest from the treasury account were to be transferred back into decedent's National City Bank account. *Id.* More importantly, the tender provided that the treasury account be titled under the appellation "Alice G. Novosielski or Thomas V. Proch." *Id.* The tender did not specifically provide appellant with a right of survivorship in the event decedent predeceased him while the account was still open. *Id.*

¶ 6 At the expiration of the first four 13-week investment periods, appellant unilaterally decided to authorize a subsequent one-year reinvestment of the treasury account holdings without consulting decedent. N.T., Master's Hearing Vol. 2, at 302. On November 16, 2001, the decedent died at the age of 79, just weeks after appellant authorized the reinvestment.

¶ 7 On December 11, 2002, appellant, acting in his role as executor, filed a first and final account of the decedent's estate excluding the treasury account from the estate. Record, No. 10. Helen Modzelski, a/k/a Helen Modzelewski, decedent's sister, filed objections to the accounting arguing appellant did not own the treasury account simply by virtue of being listed as a co-owner on the tender at the time of decedent's death and, therefore, the treasury

account should be inventoried with the estate. Record, No. 11.

¶ 8 On October 8, 2003, appellant filed an amended first and final account. In response, John Modzelewski—the son of Helen, who met an untimely demise shortly after issuing her initial objection—filed a second set of objections alleging appellant had abused his role as decedent's attorney-in fact by misappropriating and/or misusing approximately $90,000 of the decedent's funds. Record, No. 30.

¶ 9 A special master was appointed and hearings were held from November 14, 2005, until November 16, 2005, with a later hearing being held on December 7, 2005. On July 7, 2006, the master issued his report wherein he concluded, in relevant part, appellant owned the treasury account. The master also concluded appellant had breached his fiduciary duty as decedent's attorney-in-fact and, as a consequence, recommended a surcharge of $96,059. On July 17, 2006, Mr. Modzelewski filed exceptions arguing the master had erred in awarding appellant ownership of the treasury account. Record, No. 41. The orphans' court agreed and issued the Order subject of this appeal.

¶ 10 Appellant raises a single issue for our consideration: "Did the lower court err in awarding the Treasury Direct Account in the amount of $500,000.00, titled in the names of Alice G. Novosielski or Thomas V. Proch to the estate of Alice G. Novosielski?" Appellant's brief at 3.

¶ 11 Our standard of review over a final Order from the orphans' court requires a determination as to whether an error of law, abuse of discretion, or a capricious disregard of competent evidence has occurred. ***In re Estate of Ciaffoni***, 787 A.2d 971, 973 (Pa.Super. 2001), *citing* ***In re Benson***, 615 A.2d 792, 793 (Pa.Super. 1992). In applying this standard, our scope of review is limited in that we must accord the factual findings of the orphan's court, sitting without a jury, the same weight and effect as we would a jury verdict. We will not disturb the court's findings absent manifest error. ***Id.***

I. Characterizing the Treasury Account

¶ 12 As is often the case when the juxtaposition of family and money converge at the heart of a dispute, the parties in this case have little in the way of common ground. The parties' lengthy briefs both push for an intensive factual review of the case by this Court and there is significant disagreement on how the transactional structure of the treasury account initially should be characterized.

¶ 13 Appellant contends the treasury account is a "joint account" and, as such, distribution of the account is governed by the Multiple-Party Accounts Act (MPAA). ***See*** 20 Pa.C.S.A. §§ 6301-6306. According to appellant's characterization, the following provision of the MPAA controls: (a) JOINT ACCOUNT.--Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account

is created. 20 Pa.C.S.A. § 6304, **Right of survivorship**, (a) **Joint account**. [1]

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[1] Mr. Modzelewski contends the treasury account should be analyzed as an *inter vivos* gift. He further contends appellant failed to produce the clear and convincing evidence necessary to prove the treasury account was an *inter vivos* gift. ***Id.*** at 28, *citing* ***Hera v. McCormick***, 625 A.2d 682, 686 (Pa.Super. 1993). The trial court sidestepped the issue by stating that "Whether this type of account is governed by the Multiple-Party Accounts Act, ("MPAA"), 20 Pa.C.S.A. §§ 6301-6306, or is analyzed under the requirements to establish an *inter vivos* gift of the monies in the account, the conclusion is the same." Trial Court Opinion at 4. This treatment was employed to reach a practical resolution. Nonetheless, we believe this treatment, if sanctioned, could add silt to already murky water. ***See Deutsch, Larrimore & Farnish, P.C. v. Johnson***, 577 Pa. 637, 848 A.2d 137, 140 (noting the MPAA employs a testamentary rationale), *accord* 20 Pa.C.S.A. § 6304, **Right of survivorship**, (a) **Joint account**, Jt. St. Govt. Comm. Comment; ***see also In re Estate of Eastman***, 760 A.2d 16, 19 (Pa.Super. 2000), *quoting* 20 Pa.C.S.A. § 6303, **Ownership during lifetime**, (a) **Joint account**, Jt. St.Govt. Comm. Comment. There is no indication within the certified record that decedent intended appellant to be the recipient of the treasury account during her lifetime. ***See e.g.***, N.T., Master's Hearing Vol. 2, at 296 ("She says when I die, the remainder of this is going to be yours."). The intent to create an *inter vivos* gift is not at issue in this case. Analyzing the treasury account as an *inter vivos* gift, therefore, requires reliance on an unnecessary legal fiction. If we conclude the treasury account is not an MPAA "account" then the tender simply fails as a testamentary document because the tender contained no bequests and no expression of the intent to provide for a testamentary distribution. ***See generally***, **Black's Law Dictionary** 1628 (8th ed. 2004). When the intent to create an *inter vivos* gift is not directly at issue in an MPAA joint account case, applying the *inter vivos* gift analysis can lead to confusion as to who carries the burden of production and as to what evidence is relevant in carrying the burden. When a litigant argues that a decedent intended a joint account as an *inter vivos* gift to the litigant, the orphans' court should analyze the account as an *inter vivos* gift and disregard the MPAA

¶ 14 The MPAA defines an "account" as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, saving account, certificate of deposit, share account and other like arrangements." 20 Pa.C.S.A. § 6301, **Definitions**. The MPAA defines "joint account," in turn, as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship." ***Id.***

¶ 15 There is no dispute decedent was a "depositor" for purposes of the MPAA definition of "account." The parties also do not dispute that the Federal Reserve Bank responsible for administering decedent's treasury account is a "financial institution" for purposes of section 6301. ***See also Deutsch, Larrimore & Farnish, P.C.***, 577 Pa. 637, 848 A.2d 137, 146 (2004) (Cappy, C.J. dissenting) (noting that for purposes of the MPAA, the phrase "financial institution" unquestionably encompasses all banks and financial institutions). While it is apparent the treasury account subject to our review is not one of the enumerated transactional structures in section 6301, it is yet to be determined whether the treasury account is an "other like arrangement." There are very few reported cases

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ownership presumption. ***See*** 20 Pa.C.S.A. § 6303, (a) Jt. St. Govt. Comm. Comment, ***supra***. The litigant will be required to produce clear and convincing evidence of both donative intent and delivery. ***Hera***, ***supra*** at 686. If, however, a litigant argues the MPAA ownership presumption applies, there is no reason to analyze the account as an *inter vivos* gift. In these instances, the challenger will have to produce clear and convincing evidence of a "different intent" to prevail. 20 Pa.C.S.A. § 6304(a). Obviously, if a litigant advocates both an *inter vivos* gift and the MPAA ownership presumption, his position will rest on logically incoherent ground.

wherein a court of this Commonwealth, or any other court for that matter, has considered whether a certain transactional structure is an "other like arrangement" for purposes of section 6301.

¶ 16 In ***Deutsch, Larrimore & Farnish, P.C., supra***, a fractured Supreme Court analyzed the question of whether a Morgan Stanley/Dean Witter brokerage account was an "other like arrangement."[2] While the Justices disagreed on various aspects of the case,

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[2] Mr. Modzelewski contends that if we conclude the treasury account is an MPAA "account" we would be authorizing "an unprecedented state extension into the federal arena." Appellee's brief at 34. In support of this contention, he points to ***Union National Bank of Texas v. Ornelas-Gutierrez***, 772F.Supp. 962 (S.D. Tex. 1991).

The plurality in ***Deutsch, Larrimore & Farnish, P.C. v. Johnson***, 577 Pa. 637, 848 A.2d 137 (2004) cited ***Ornelas-Gutierrez*** and paraphrased the district court's holding—namely, the "finding that the investment by UNB in book-entry United States Treasury bills on behalf of a depositor was not an 'account' as defined by the Texas Probate Code, but rather was a brokerage-custodial agreement between UNB and the depositor." ***Id.*** at 141. The Court, in the next breath, goes on to state: "While a brokerage account is not one of the enumerated services of a financial institution in that it is not a checking or savings account, we believe that a brokerage account is encompassed within the purview of 'share accounts, and other like arrangements.'" ***Deutsch, Larrimore, supra*** at 141.

We believe our Supreme Court aptly recognized that in analyzing whether a transactional structure is an "other like arrangement" for purposes of the MPAA, the depositor's viewpoint and expectations of the transactional structure, and not the viewpoint of the financial institution, should be paramount given the rationale underlying the MPAA. ***See contra Ornelas-Guiterrez, supra*** at 966 (concluding that since banks typically list deposits on their balance sheets as assets and, that since UNB could not list treasury bills as assets pursuant to internal bank regulations, treasury accounts could not be "MPAA" accounts).

two approaches emerged for analyzing such questions.

¶ 17 The first, advanced by Madame Justice Newman in the plurality Opinion, focuses on the transactional structure at issue in order to determine whether the depositor deposited funds with a financial institution with the expectation that the funds would generate some future yield. ***Id.*** at 141. In advancing this approach, Madame Justice Newman delineated a distinction in the case law between the transfer of the ownership of an asset directly to the depositor and the receipt of an ownership interest in an account or other entity holding a specific asset on the depositor's behalf. ***Id.***, *quoting* ***Balazick v. Ireton***, 518 Pa. 127 n.1, 541 A.2d 1130 n.1 (1988) ("Ownership of the securities is not transferred to the customer, and the bank does not create a deposit contract," but "issues a receipt indicating the ownership of the interest [that] has been created..."). The second approach, set forth in Justice Saylor's concurring Opinion, focused on looking to whether the Morgan Stanley/Dean Witter brokerage account shared "characteristics generally associated" with some of the traditional transactional structures enumerated in section 6301. ***Id.*** at 144 (Saylor, J. concurring).

¶ 18 Application of both analytical approaches yields the same result in this case—decedent's treasury account is, indeed, an "account" for purposes of the MPAA. The documentation from Treasury Direct contained in the certified record references decedent's interest as an account and statements submitted by the service to decedent detail the account "holdings." ***See e.g.***, Record, No.

62, Objector's Exhibits, Exb. M, Statement of Account; *accord*, ***id.*** at Exb. II, Treasury Direct Investor Kit, at 5 ("Here's how it all works. When you buy our first Treasury security through Treasury Direct, we'll create an Investor Account in your name. It's a single account to hold all your marketable Treasury securities."). A depositor deciding whether to employ the treasury account transactional structure would have the expectation that the treasury account is what it purports to be. ***See*** footnote #2, ***supra*** *citing* ***Deutsch, Larrimore & Farnish, P.C.***, ***supra*** at 141.

¶ 19 Moreover, the enumerated transactional structures in section 6301 and the Morgan Stanley/Dean Witter brokerage account at issue in ***Deutsch, Larrimore & Farnish, P.C.*** share a common pattern. The depositor deposits funds with another entity. The entity invests or loans the funds. The investment or loan to which the funds are directed does not become the personal property, in of itself, of the depositor even though the depositor is, or could be, aware of the nature and characteristics of the investment or loan. The investment or loan generates a yield or interest. The principal and the yield or interest are returned either upon the depositor's demand or on a predetermined maturity date.

¶ 20 Unquestionably, decedent's treasury account fits this pattern. Decedent transferred $500,000 to the Treasury Direct service. Treasury Direct invested the funds in a United States Treasury Bill, which was held on account with a Federal Reserve Bank. The Treasury Bill itself was never delivered or titled in decedent's name, although she was

aware of the Bill. The Bill generated interest income. The Bill was then liquidated and the principal and interest yield were returned.

¶ 21 There is no question the treasury account also fits the MPAA definition of "joint account." The Treasury Direct Investor Kit, a pamphlet issued by the Treasury Direct service that provides information for prospective investors, notes that the service will sell securities held in a treasury account on demand and deposit the proceeds of any sale in an account designated by a depositor. Record, No. 62, Objector's Exhibits, Exb. II, at 17, *accord* Record, No. 63, Objector's Exhibits, Exb. 7, at 25; ***see also*** 20 Pa.C.S.A. § 6301 (defining "joint account" as "an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship"). By virtue of the account being titled with the designation "Alice G. Novosielski or Thomas V. Proch," a title that employs the connective "or," both decedent and appellant had the authority to authorize transactions with the account pursuant to the terms of the kit. ***Id.*** at Exb. II, at 5, *accord* ***id.*** at Exb. 7, at 6; ***see also*** 20 Pa.C.S.A. § 6301.

¶ 22 Accordingly, we find decedent's treasury account to be an "account" and, more specifically, a "joint account" for purposes of section 6304(a). We must start with the presumption that the funds in the treasury account belong to appellant. 20 Pa.C.S.A. § 6304(a), Jt. St. Govt. Comm. Comment ("The underlying assumption is that most persons who use joint accounts want the survivor or survivors to have all balances remaining at death.").

We now turn to the question of whether Mr. Modzelewski was able to provide clear and convincing evidence showing decedent had a different testamentary intent when the tender was executed. 20 Pa.C.S.A. § 6304(a).

II. Intent

¶ 23 Appellant alleges the orphans' court exceeded its authority in concluding decedent did not intend appellant to own the treasury account when it was created by disregarding binding credibility determinations made by the master. Appellant's brief at 9-10, *citing* ***In re Sweeney***, 695 A.2d 426, 428 (Pa.Super. 1997).

¶ 24 We decline the opportunity to delineate the scope of the deference an orphans' court must give the credibility determinations contained within a master's report. ***Cf. In re Sweeney***, ***supra*** at 429 ("Upon his review, the trial court had the power to accept or reject the master's report and recommendations in whole or in part; he could have remanded to supplement the record or for consideration of issues not fully considered by the master; he could have held hearings to supplement the findings of the master, as he could have permitted oral arguments and submission of briefs, all before he entered the final Order."). Suffice it to say, it is apparent the master did not rely upon appellant's credibility in rendering its initial report given the master's corresponding finding that appellant breached his fiduciary duties as decedent's attorney-in-fact in effectuating no less than nine unauthorized transactions. Record, No. 39, Master's Report, Conclusions of Law, at 6-7, ¶¶3-8. Indeed, the master did not make an

explicit finding that appellant was a credible witness. ***Id.***, Findings of Fact, at 1-6.

¶ 25 Rather, the master's report makes it clear he relied on other evidence in concluding decedent intended ownership of the treasury account be transferred to appellant upon her demise. The master pointed out that decedent had executed a will in 1976, subsequently revoked, wherein she evinced the intent to bequeath half of her estate to appellant's mother in the event decedent predeceased her, and that she drafted an unexecuted will in 1995, wherein she evinced an intent to bequeath her entire estate to appellant's mother in the event decedent predeceased her. Record, No. 39, Master's Report, Discussion, Treasury Direct Account, at 13.

¶ 26 The master's reliance on the 1976 revoked will and the 1995 unexecuted will to bolster his conclusion that decedent intended appellant to own the treasury account was erroneous. The master's reliance derived from an attempt to demonstrate the decedent intended appellant to have the treasury account upon her death. After it is determined that an MPAA account is at issue, however, a section 6304(a) analysis should not be focused on reinforcing the ownership presumption by establishing whether or not the decedent was able to form the intent, or did so intend, to create a testamentary distribution in creating an MPAA joint account. ***See*** 20 Pa.C.S.A. § 6304(a); ***see also*** footnote 1, ***supra***. Testamentary intent is assumed by operation of statute. ***Id.*** We suspect this misplaced focus led to the master's reliance on the 1976 revoked will and the 1995 unexecuted will,

both of which are inoperative expressions of the decedent's intent as a matter of law. To the contrary, the master was to look for clear and convincing evidence of a "different intent" at the time the account was created that would result in a disposition that would differ from the distribution that would occur if the section 6304(a) ownership presumption were to be applied. ***Id.*** Such clear and convincing evidence exists in the certified record of this case.

¶ 27 In June of 1995, decedent duly executed a last will and testament bequeathing her estate, in the event her husband predeceased her, *per stirpes* to two living siblings and the children of three other predeceased siblings. Record, No. 62, Objectors' Exhibits, Exb. H. This will was republished on September 15, 2000, when appellant executed a codicil. Record, No. 63, Respondent's Exhibits, Exb. 5, First Codicil. The treasury account was not mentioned in the codicil, even though the tender was executed within four days of the codicil being executed. ***Id.*** No evidence was offered indicating this will was revoked.[3] Upon decedent's death, the 1995

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[3] The Wills Act makes it clear that the execution of the tender, in of itself, would be insufficient to revoke decedent's validly executed will:

> No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than: (1) WILL OR CODICIL. By some other will or codicil in writing; (2) OTHER WRITING. By some other writing declaring the same, executed and proved in the manner required of wills; or (3) ACT TO THE DOCUMENT. By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revocation, by the testator himself or by another

will and 2000 codicil were effective as expressions of the testator's intent by operation of law. The will left approximately one-tenth (1/10) of the decedent's estate to appellant, which is a far lesser share than the approximate four-fifths (4/5) share appellant would receive if he were found to be the owner of the treasury account. Record, No. 62, Objectors' Exhibits, Exb. H.

¶ 28 When the execution of a valid will pre-dates the creation of a challenged MPAA joint account, we must consider whether the intentions expressed in the will can be read in a manner that is consistent with the decision to place assets in the MPAA joint account. If we cannot find such consistency the expression of intent in the will must control unless we determine that the creation of the joint account functions as a revocation of the validly executed will. [4] ***See*** 1 Pa.C.S.A. § 1932(a), **Statutes in *pari materia*; *see also*** 20 Pa.C.S.A. § 2505, **Revocation of a will.**

¶ 29 In this instance, the distribution scheme contemplated in decedent's will and codicil varies drastically from the distribution which would occur if the section 6304(a) ownership presumption were

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> person in his presence and by his express direction. If such act is done by any person other than the testator, the direction of the testator must be proved by the oaths or affirmations of two competent witnesses.

20 Pa.C.S.A. § 2505, **Revocation of a will.**

[4] We leave the task of defining the scope of the term "consistency" for future cases.

to be applied. We find no consistency between the intent expressed by decedent's will and codicil and the decision to create the treasury account. To apply the ownership presumption would be, for all practical purposes, to use section 6304(a) to revoke the prior will in a manner not contemplated by our statutory scheme. ***See*** 20 Pa.C.S.A. § 2505. By giving effect to the plain language of section 6304(a) requiring clear and convincing evidence of a different intent to be produced, we are able to read section 6304(a) in a manner consistent with the language and objectives of the Wills Act. ***See generally***, 1 Pa.C.S.A. § 1903(a), **Words and Phrases**; 1 Pa.C.S.A. § 1921, **Legislative intent controls**; 1 Pa.C.S.A. § 1932(a). We must give effect to the will. To conclude otherwise would lead to the frustration of testamentary intent and could result in fraud. Decedent's 1995 will and the 2000 codicil are precisely the form of clear and convincing evidence section 6304(a) contemplates a challenger must produce in defeating the presumption of ownership of a joint account. By its very nature, a validly executed will is the clearest and most convincing evidence of a decedent's intent that can be produced.

¶ 30 This case serves as a graphic illustration of the problems that could arise if we were to ignore valid wills executed prior to the creation of challenged MPAA joint accounts by blindly deferring to the section 6304(a) ownership presumption. ***Cf. In re Falucco***, 791 A.2d 1177, 1180 (Pa.Super. 2002) (concluding the MPAA ownership presumption was not defeated when the creation of an MPAA account was followed by the execution of a valid will five days later as both were part of the same estate

plan). The decedent executed a will in 1995. Five years later, on September 15, 2000, decedent executed a codicil republishing her 1995 will.
Four days after the execution of the codicil, appellant used his power as decedent's attorney-in-fact to persuade the decedent to invest in a treasury account titled in both the decedent's "or" the appellant's name. No right of survivorship was specifically designated.

¶ 31 At the time the tender was executed, decedent was in a perilous mental condition having been diagnosed with being in an acute confusional state replete with hallucinations, delusional disorder, and with psychotic depression by a clinical psychologist in October of 1999, which degenerated into senile dementia by September of 2001. Record, No. 62, Objector's Exhibits, Exb. KK, Transcribed Notes of 10/15/99 Psychiatric Consultation; T.N. of 10/21/99 Psychiatric Consultation; T.N. of 9/18/01 Psychiatric Consultation; ***see contra*** Record, No. 39, Master's Report at 13 (finding appellant was "sharp as a tack" based on the testimony of her caregivers who, from what we can discern from the record, had no training in psychiatry). There is no evidence of record demonstrating decedent had any idea what the legal ramifications of titling the treasury account in both her

and appellant's names would be. Indeed, appellant testified he did not know whether decedent read the Treasury Direct Investor Kit he provided her with prior to the opening of the treasury account and he also could not produce an exact copy of the edition of the kit he provided to decedent for the orphans' court. N.T., Master's Hearing Vol. 2, at 303 ("I have

no knowledge of whether she read the entire thing. I have no knowledge of whether she understood the entire thing."); ***see also*** N.T., Master's Hearing Vol. 1, at 74, 86-87.

¶ 32 Appellant was found to be an opportunist who abused his position as decedent's attorney-in-fact to effectuate no fewer then nine unauthorized transactions with decedent's funds. He stood in a confidential relationship with the decedent, executed the treasury account tender with his own hand, and excluded the other members of the family and heirs under the 1995 will and 2000 codicil from the management of decedent's day to day affairs. Appellant reinvested the treasury account principal and proceeds for an extra year without consulting the decedent. The decedent died during the extended reinvestment period.

¶ 33 In conclusion, we find the trial court's analysis reaches the correct legal conclusion, even though it fails to take the most direct analytical route. ***See e.g., Nationwide Mut. Ins. Co. v. Fleming***, 924 A.2d 1259, 1269 n.5 (Pa.Super. 2007) ("As an appellate court, we may uphold a decision of the trial court if there is any proper basis for the result reached; thus we are not constrained to affirm on the grounds relied upon by the trial court."), *citing* ***In re Adoption of R.J.S.***, 889 A.2d 92, 98 (Pa.Super. 2005) (additional citation omitted). Accordingly, we discern no reversible error in the trial court's decision to order appellant to inventory the treasury account in the Novosielski estate. ***In re Estate of Ciaffoni***, ***supra*** at 973 (citation omitted).

¶ 34 Order affirmed. ¶ 35 Popovich, J., concurs in the result.

APPENDIX C:

Pa. ORPHANS' COURT *NOVOSIELSKI* OPINION

IN THE COURT OF COMMON PLEAS OF
WESTMORELAND COUNTY, PENNSYLVANIA

ORPHAN'S COURT DECISION

IN RE: Estate of Alice G. Novosielski, Deceased

No. 65-01-22-14

ADJUDICATION

BY THE COURT:

Before the court are cross-exceptions to the master's report. The report recommends: (1) that the court surcharge the executor, Thomas V. Proch, the decedent's nephew, and order him to reimburse the estate in the amount of $96,059.00 for the misuse of funds or the failure to properly account for funds entrusted to him by the descendent, Alice G. Novosielski, as her attorney-in-fact; and (2) that the court find that the Treasury Direct account in the sum of $500,000.00, at the time of the decedent's death at age 79, is not an estate asset but an inter vivos transfer in the nature of a gift to the executor, who, as attorney-in-fact, opened the account in his own name and hers.

The executor has filed exceptions to the first recommendation calling for a surcharge, and for reimbursement of $35,549.99 for payment of Pennsylvania Inheritance Tax on the Treasury Direct account. John A. Modzelewski, as administrator of the Estate of Helen Modzelski a/k/a Helen Modzelewski, one of the beneficiaries under the decedent's will, has filed exceptions to the second recommendation concerning ownership of the $500,000.00 Treasury Direct account.

After reviewing the briefs from the parties, hearing oral arguments, and carefully reviewing almost eight hundred pages of testimony presented to the master, I conclude: (1) the executor's exceptions to the surcharge of $96,059.00 will be overruled; (2) the beneficiary's exceptions to the exclusion of the $500,000.00 account from the estate's assets will be sustained; and (3) the executor's exceptions seeking reimbursement for payment of inheritance tax in the amount of $35,549.99 will be sustained.

The orphan's court has the power to accept or reject the master's report and recommendations in whole or in part. In re Sweeney, 695 A.2d 426, 429 (Pa. Super. 1997). In reviewing the report of the master, the orphan's court shall not set aside the finding and conclusions of the master absent a finding of error in applying the law to the facts, or failure by the master to fully consider all matters required to be heard. Id. at 428. As the trier of fact, the master is entitled to weigh the evidence presented and assess its credibility. Id. at 430. The fact-finder is free to believe all, part or none of the

evidence and the master's credibility determinations will not be disturbed. Id.

I will first note that I agree with the master's recommendation that the court surcharge the executor in the amount of $96,059.00 for the misuse of funds or the failure to properly account for funds entrusted to him by the decedent, Alice G. Novosielski, as her attorney-in-fact. Mr. Proch failed to account for $76,088.00 in cash expenditures made on Mrs. Novosielski's behalf. (Master's Rep. at 11) Included in those cash disbursements, Mr. Proch made gifts of cash to himself, his wife and his father in the amount of $54,000.00, which do not qualify as permissible "limited gifts" pursuant to the terms of the Power of Attorney. (Master's Rep. at 10). Mr. Proch paid to his wife $4,654.00 for vehicle expenses, $424.00 for cell phone expenses and $750.00 as a gift, all of which the master found improper since they were not made for the direct benefit of Mrs. Novosielski. (Master's Rep. at 11) In addition, Mr. Proch failed to account for $5,106.00 from a certificate of deposit that was cashed, and failed to account for $2,755.00 from treasury bonds that were cashed. There was another $1,500.00 gift to himself that was beyond the powers granted to him in the power of attorney, and he was unable to remember the reason for a $4,781.00 withdrawal from the decedent's National City account. I have reviewed the record and adopt the master's recommendation that the executor should be surcharged in the amount of $96,059.00

Next, I will address the issues pertaining to the Treasury Direct account. The account was created directly over the internet by Mr. Proch. (N.T. at 81).

There was no person involved in the sale of these securities, and all transactions, apart from Mrs. Novosielski's placement of her signature on the bond tender application, were performed by Mr. Proch (N.T. at 77=78, 80-82, 290, 295-97, 300-02.)

As attorney-in-fact, Mr. Proch consolidated all of Mrs. Novosielski's assets into one account at National City. (N.T. at 70, 194, 262.) The bulk of the liquid assets were then placed in a Treasury Direct account. (N.T. at 72-73, 80, 284, 292, 295.) He titled the account in the names of "Alice G. Novosielski or Thomas V. Proch." (Respondent's Ex. G.) Mr. Proch had contacted Mrs. Novosielski's attorney, James E. Kopelman, Esquire, regarding the propriety of consolidation all of her assets and placing them in a Treasury Direct account, (N.T. at 73, 78, 292, 399), but nowhere does it appear that he informed Mr. Kopelman that the account was to be titled in any manner other than with his name added as attorney-in-fact, (N.T. at 419, 431.)

Whether this type of account is governed by the Multiple-Party Accounts Act ("MPAA"), 20 Pa C.S.A. §§ 6301-6306, or is analyzed under the requirements to establish an inter vivos gift of the monies in the account, the conclusion is the same. The MPAA provides for the disposition of the account upon the death of one party as follows:

> Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created.

20 Pa. C.S.A. § 6304(a). The statutory presumption of survivorship is overcome by clear and convincing evidence of a contrary intent when the joint account is created. Estate of Meyers, 642 A.2d 525, 528 (Pa. Super. 1994). Accepting Mr. Proch's own testimony, Mrs. Novosielski's intent at the time the account was created was that the money would be used for her care, depending on how long she lived. (N.T. at 79.) Mr. Proch testified that the account was created as an "interest pump that would supplement her salary to pay for her care." (N.T. at 292; see also N.T. at 305, 311.) The interest earned on the account was automatically deposited in Mrs. Novosielski's individually titled Nation City account, (N.T. at 80-81, 297-98), and was reported on her tax returns, (N.T. at 82.) Pursuant to the terms of the investor kit, when the securities matured, the funds were to be automatically deposited into Mrs. Novosielski's individually titled Nation City account.[1] (N.T. at 298, 300; see also N.T. at 70, 72, 186, 193.) The above evidence is sufficient to rebut the survivorship presumption, by clear and convincing evidence, as the account was obviously a "convenience account" and was not intended as a present gift of the monies to Mr. Proch at the time the account was created.

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[1] The court notes that Mr. Proch reinvested the securities in the account for another year without the knowledge or consent of Mrs. Novosielski. (N.T. at 81-82, 302.) As a result of the renewal by Mr. Proch, the securities were due to mature on December 28, 2001. After Mrs. Novosielski's death on November 16, 2001, Mr. Proch set up his own individual account and arranged for the funds to be sent to him when they matured. (N.T. at 284-85, 302-03.)

I also find the evidence insufficient to meet the requirements of an inter vivos gift. The elements of a valid inter vivos gift are donative intent and delivery. Estate of Petro, 694 A.2d 627, 632 (Pa. Super. 1997). Where a confidential relationship is found the exist, the burden shifts to the donee to prove by clear and convincing evidence that the transaction was the free, voluntary and independent act of the donor, and that the donor executed it with a knowledge and understanding of the nature, terms and consequences thereof. Estate of Buriak, 492 A.2d 1166, 1168 (P. Super. 1985.)

A confidential relationship will be found to exist "whenever one occupies toward another such a position of advisor or counselor as reasonably to inspire confidence that he will act in good faith for the other's interest." Estate of Lakatosh, 656 A.2d 1378, 1383 (Pa. Super. 1995); see also Foster v Schmitt, 239 A.2d 471, 474 (Pa. 1968). The existence of a power of attorney given by one person to another can be a clear indication that a confidential relationship exists between the parties. Estate of Lakatosh, 656 A.2d at 1383 (the court noted there is no clearer indication of a confidential relationship than giving another person the power of attorney over one's entire life savings). This is particularly true when the alleged done is shown to have spent a great deal of time with the decedent or assisted in decedent's care. Id. (quoting Hera v McCormick, 625 A2d 682,691 (Pa. Super. 1993)).

This is not a situation where the attorney-in-fact was simply signing the principal's checks and paying the principal's bills. Rather, Mr. Proch was managing Mrs. Novosielski's assets, worth hundreds

of thousands of dollars. (N.T. at 137-38, 261.) While Mrs. Novosielski was aware of the general proposition that all of her assets were going to be consolidated into one account at National City, Mr. Proch performed most of the particular transactions without her knowledge. (N.T. at 70, 110, 137-38, 190, 194-95, 259-62.) Mr. Proch testified that Mrs. Novosielski was only interested in the bottom line, i.e., whether she had sufficient assets over her expenses to accommodate her being able to remain at home, as opposed to entering a nursing home. (N.T. at 263-66.) In addition, she would not discuss her finances in the company of anyone other than Mr. Proch. (N.T. at 41, 211, 219.) Therefore, it is reasonable to assume that she placed her confidence in Mr. Proch be entrusting him with her life savings in order to obtain this goal.

In further support of a confidential relationship, Mr. Proch was very involved in all aspects of the decedent's life. (N.T. at 27, 90.) He visited her every weekend, and sometimes during the week. (N.T. at 15, 20, 82, 102, 246.) Apart from the aides that card for her, Mr. Proch and his wife were the only family members tending to her needs. (N.T. at 15, 83.) Mr. Proch arranged for the procurement of aides and pain them their wages according to time sheets they submitted to him. (N.T. at 34, 91.) He did most of the major grocery shopping for her, (N.T. at 13, 15, 94, 246), and set up a petty cash drawer in the house for aides to get any necessary items, (N.T. at 94, 216). He installed a strongbox in the house that held substantial sums of cash, to which he had the only key. (N.T. at 95.) He prepared her income tax returns. (N.T. at 232.) Mr. Proch was involved in the selection of her physicians (N.T. at 179, 182),

and arranging for her care in a nursing home, (N.T. at 151). In addition to handling all of her financial matters, the foregoing is further evidence that a confidential relationship existed.

I find that Mr. Proch did not prove, by clear and convincing evidence, that Mrs. Novosielski intended to make a present inter vivos gift of the funds. As stated above, the account was set up as a convenience account to be used for Mrs. Novosielski's care during her lifetime. While there was testimony regarding Mrs. Novosielski's stated intention that the monies in the account were to go to Mr. Proch upon her death, such a testamentary disposition of property fails to meet the formal requirements for a testamentary disposition and negates any present intention of Mrs. Novosielski to make an inter vivos gift of the funds to Mr. Proch. Therefore, the beneficiary's exceptions to the failure of the master to find that the Treasury Direct account should be included as an estate asset is sustained.

Finally, the executor's exception for reimbursement of inheritance tax paid by Mr. Proch on the Treasury Direct account will be sustained. Regardless of the court's ruling on the ownership of the Treasury Direct account, Mr. Proch claimed reimbursement in the amount of $35,549.99 for inheritance tax paid by him on the Treasury Direct account. (N.T. at 137, 400.) In light of my finding that the Treasury Direct account should be included as an estate asset, the executor's exception seeking reimbursement for his payment of inheritance tax on the Treasury Direct account will be sustained.

FINAL DECREE

AND NOW, this 8th day of January, 2007, upon consideration of the master's report and recommendations, as well as the exceptions filed to the master's report, the following is ordered:

(1) A surcharge is entered against Thomas V. Proch, Executor of the Estate of Alice G. Novosielski, in the amount of $96,059.00;
(2) The Treasury Direct account in the amount of $500,000.00, titled in the names of Alice G. Novosielski or Thomas V. Proch, is an estate asset and the proceeds of the same shall be returned to the estate by Thomas V. Proch.
(3) The estate shall reimburse Thomas V. Proch in the amount of $35,549.99 for inheritance tax paid on the Treasury Direct Account; and,
(4) Responsibility for the payment of fees for the master and stenographer in the amount of $9,884.76 shall be divided equally between the executor and beneficiary. Since the executor has advanced the entire amount of $9,884.76, the beneficiary is directed to pay Thomas V. Proch the amount of $4,942.38.

BY THE COURT:

s/_____

Daniel J. Ackerman, President Judge

APPENDIX D:
PA. SUPREME COURT DENIES REARGUMENT

"REARGUMENT / RECONSIDERATION / REMITTAL

Filed Date: April 8, 2010

Disposition: Order Denying Application for Reargument Date: July 28, 2010

Reargument Order:

AND NOW, this 28th day of July, 2010, the Application for Reargument is hereby DENIED.

Record Remittal: July 28, 2010

[**Petitioner Note**: Above Text reproduced from Pa. Supreme Court online Docket Sheets]

APPENDIX E:

JUDICIAL QUESTIONS TIMELY RAISED BY PETITIONER WITH PENNSYLVANIA COURTS

The judicial questions raised to this Court are:

I. Can the Uniform Probate Code's provision related to "Multiple Person Accounts" be the controlling law when adjudicating a dispute involving U.S. Treasury securities?

II. Is Pennsylvania's MPAA legislation in conflict with, and pre-empted, by federal law?

Petitioner asserts that these issues were timely raised at the Pa Orphans' Court, Pa. Superior Court, and Pa Supreme Court level.

[**Note**: The Supreme Court of Wyoming has reviewed federal law versus state law potential conflicts even if not raised at the lower court levels. See *Oatts v Jorgenson,* 821 P. 2d 108, 112 (Wyo. 1991)]

PETITIONER' ORPHANS' COURT BRIEF:

> "Petitioner presents three arguments to demonstrate that MPAA does not extend to investments undertaken via a Treasury Direct facility:
>
> A. The U.S. Treasury is not a "financial institution" as defined under the MPAA.

B. Investment through a Treasury Direct facility does <u>not</u> an involve investment in a pool of assets (or a "deposit of funds" as defined in MPAA). Rather, a Treasury Direct facility, as the name implies, is solely for the direct ownership of specific, identifiable, Treasury securities.

C. **The property rights of a Treasury security held in co-ownership in a Treasury Direct facility are defined by U.S. Treasury regulations, superseding any Pennsylvania statute defining property rights** (the sole purpose of the MPAA)."

- *Petitioners brief filed October 3, 2005, with the Court of Common Pleas of Westmoreland County, Pennsylvania , Orphans' Court Division, pages 5-6 (**emphasis** added)*

<u>Pa. Orphans' Court opinion</u>:

Noting that the "Orphans' court has the power to accept or reject the master report and recommendations in whole or in part" *(at 2)*, the Orphans' court:

> "I .. adopt the master recommendation that the executor should be surcharged .. $96,096." *(at 3)*

The Pa. Orphan's Court then deferred on any decision whether the $500,000 U.S. Treasury Bill was covered under Pa.'s MPAA:

> "Whether this type of account is governed by the Multiple Party Accounts Act

("MPAA"), 20 Pa. C.S.A. Sections 5301-6306, or is analyzed under the requirements to establish an inter vivos gift of the monies in the account, the conclusion is the same." *(at 4)* . . . . . "evidence is sufficient to rebut the survivorship, by clear and convincing evidence, as the account was obviously a "convenience account" and was not intended as a present gift of the monies to Mr. Proch at the time the account was created." (at 5). . . . . "a confidential relationship existed" (at 7). . . . . "The Treasury Direct Account in the amount of $500,000 is an estate asset and the proceeds of the same shall be returned to the estate by Thomas V. Proch". (at 9)

PETITIONER'S BRIEF TO THE PA SUPERIOR COURT:

"If this court deems to set a new precedent and include direct ownership of U.S. Securities as MPAA 'accounts', it would be contrary to the Pa. Supreme Court ruling in *Deutsch v. Johnson* and an **unprecedented state extension into the federal arena**, which, per appellee's extensive review, has not been done in any other State in the Union."[Footnote]

Footnote: :

"Appellee has found only one case involving book-entry U.S. Treasury Bills, referred to in *Deutsch v. Johnson,* and it

deemed U.S. Treasuries not to be an "account" as defined by Texas Probate Code:

> "DL&F maintains that courts in other jurisdictions have also come to these same conclusions when construing the Uniform Probate Code, the code on which the Multiple-Party Accounts Act is based. See *Union National Bank of Texas v. Ornelas-Gutierrez, 772 F. Supp. 962 (S.D. Tex. 1991)* (finding that the investment by UNB in book-entry United States Treasury bills on behalf of a depositor was not an "account" as defined by the Texas Probate Code)" *Deutsch v. Johnson, supra*]
>
> - *Petitioner's Brief to the Pa. Superior Court, dated May 25, 2007, pg. 34* (**emphasis** added)]

Pa. Superior Court opinion

The Superior Court dismissed Petitioner's position and the Federal District's Court rationale in *Union National Bank* case:

> "Mr. Modzelewski contends that if we conclude the treasury account is an MPAA "account" we would be authorizing "an unprecedented state extension into the federal arena." Appellee's brief at 34. In support of this contention, he points to ***Union National Bank of Texas v. Ornelas-Gutierrez***, 772 F.Supp. 962 (S.D. Tex. 1991).
>
> The plurality in ***Deutsch, Larrimore & Farnish, P.C. v. Johnson***, 577 Pa. 637, 848 A.2d 137 (2004) cited ***Ornelas-Gutierrez*** and paraphrased the district court's holding—namely, the "finding that the investment by UNB in book-entry United

States Treasury bills on behalf of a depositor was not an 'account' as defined by the Texas Probate Code, but rather was a brokerage-custodial agreement between UNB and the depositor." ***Id.*** at 141. The Court, in the next breath, goes on to state: "While a brokerage account is not one of the enumerated services of a financial institution in that it is not a checking or savings account, we believe that a brokerage account is encompassed within the purview of 'share accounts, and other like arrangements.'" ***Deutsch, Larrimore, supra*** at 141. We believe our Supreme Court aptly recognized that in analyzing whether a transactional structure is an "other like arrangement" for purposes of the MPAA, the depositor's viewpoint and expectations of the transactional structure, and not the viewpoint of the financial institution, should be paramount given the rationale underlying the MPAA. ***See contra Ornelas-Guiterrez, supra*** at 966 (concluding that since banks typically list deposits on their balance sheets as assets and, that since UNB could not list treasury bills as assets pursuant to internal bank regulations, treasury accounts could not be MPAA" accounts)."

-Pa. Superior Court opinion at 8

[**Petitioner Note**: the Superior Court's "logic" in rejecting the U.S. District's Court decision in *Union National Bank of Texas* collapses in that Mrs. Novosielski, under the Code of Federal Regulations, had the right to transfer the $500,000 U.S. Treasury

security to any custodian financial institution, including the Union National Bank of Texas. In such a case, the factual circumstances under *Novosielski* and *Union National Bank* would be identical. The Superior Court opinion leads to the untenable judicial conclusion that if the U.S. Treasury holds the security, then Pa. MPAA applies, but, if a custodian bank holds the security, MPAA does not apply!].

> "We find decedent's treasury account to be . . .a "joint account" for the purposes of section 6304 (a)" *(Superior Court opinion, at 22)*

PETITIONER'S BRIEF TO THE PA. SUPREME COURT:

> "**Federal Law (the Code of Federal Regulations) controls this dispute**
>
> *Free v. Bland* [1], 369 U.S. 663, 82 S. Ct. 1089, (1962) is unambiguous in its ruling that no State law (including MPAA) can be imposed on a U.S. Treasury security. Any attempt to apply a State law (such as MPAA) to a U.S. Treasury is a Supremacy Clause violation.
>
> Federal law (Code of Federal Regulations) not State law (MPAA) controls the adjudication of the $500,000 U.S. Treasury Bill in dispute in this case."
>
> *-Petitioner's Pa Supreme Court Brief, pg 10*

PA. SUPREME COURT OPINION

The Pa. Supreme Court granted this question *(at 11)* to be reviewed by the Court:

> *"1) By applying state law to override federal treasury regulation, is the Superior Court's award of the joint treasury account to the decedent's estate precluded by the Supremacy Clause of the United States?"*
>
> In that "no mention of federal treasury regulations occurred in the respective decisions of the master, orphans' court and Superior Court." the issue was deemed to have been "apparently waived". *(at 12)*

[**Petitioner's note**: The petitioner's initial brief (see above) to the Pa. Orphan's court clearly stated that the Code of Federal Regulations controls this dispute:

> "The property rights of a Treasury security held in co-ownership in a Treasury Direct facility are defined by U.S. Treasury regulations, superseding any Pennsylvania statute defining property rights (the sole purpose of the MPAA)." *Petitioners brief filed October 3, 2005, with the Court of Common Pleas of Westmoreland County, Pennsylvania , Orphans' Court Division, pages 5-6]*

The Pa. Supreme Court did note that in *Oatts v Jorgenson,* 821 P. 2d 108, 112 (Wyo. 1991), a claim of state law preemption by federal law was

considered "of such importance that it may be considered for the first time on appeal" *(at 12)*

Nevertheless, the Pa. Supreme Court dismissed the issue of state versus federal law as an issue "improvidently granted"(at 14):

> "The historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress. Dooner, supra. With this principle in mind, and because the parties have failed to set forth an argument that would compel the application of federal preemption in this matter, an issue waived below, we dismiss the first stated issue as having been improvidently granted."

APPENDIX F:

20 Pennsylvania Consolidated Statutes
Chapter 63, Multiple-Party Accounts Act (MPAA)

20 PENNSYLVANIA CONSOLIDATED STATUTES

Commonly referred to as the "Decedents, Estates and Fiduciaries Code"

CHAPTER 63 MULTIPLE-PARTY ACCOUNTS

6301. Definitions.
6302. Applicability of chapter.
6303. Ownership during lifetime.
6304. Right of survivorship.
6305. Form of account.
6306. Accounts and transfers nontestamentary.

Enactment. Chapter 63 was added July 9, 1976, P.L.547, No.134, effective Sept. 1, 1976.
Applicability. Section 2 of Act 134 of 1976 provided that Chapter 63 shall apply to any account created after September 1, 1976, and to any account existing prior to September 1, 1976, when a contract of deposit concerning it is executed after September 1, 1976.

§ 6301. Definitions.

The following words and phrases when used in this chapter shall have, unless the context clearly indicates otherwise, the meanings given to them in this section:

"Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangements.

"Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee.

"Financial institution" means any organization authorized to do business under State or Federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations and credit unions.

"Joint account" means an account payable on request to one or more of two or more parties whether or not mention is made of any right of survivorship.

"Multiple-party account" is either a joint account or a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association, charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement.

"Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto

made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of life insurance added to the account by reason of the death of the party whose net contribution is in question.

"Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account.

"Payment" of a sum on deposit includes withdrawal, payment on check or other directive of a party, any pledge of a sum on deposit by a party, and any set-off or reduction or other disposition of all or part of an account pursuant to a pledge.

"Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this chapter the request for withdrawal or payment is treated as immediately effective and a notice of intent to withdraw is treated as a request for withdrawal.

"Withdrawal" includes payment to a third person pursuant to check or other directive of a party.

§ 6302. Applicability of chapter.

The provisions of this chapter are applicable solely to the determination of property rights among parties to multiple-party accounts and all claims made through them but do not apply to and do not affect financial institutions or their rights and liabilities with respect to multiple-party accounts, which shall be determined exclusively by applicable law other than this chapter. No right or claim against a financial institution may be based on this chapter. Nothing in this chapter shall affect the taxability of transfers under the act of June 15, 1961 (P.L.373, No.207), known as the "Inheritance and Estate Tax Act of 1961."

§ 6303. Ownership during lifetime.

(a) **Joint account.**--A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sum on deposit, unless there is clear and convincing evidence of a different intent.

§ 6304. Right of survivorship.

(a) **Joint account.**--Any sum remaining on deposit at the death of a party to a joint account belongs to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 6303 (relating to ownership during lifetime) augmented by an equal per capita

share for each survivor of any interest the decedent may have owned in the account immediately before his death; and the right of survivorship continues between the surviving parties.

§ 6305. Form of account.

The applicability of the provisions of section 6304 (relating to right of survivorship) is determined by the form of the account at the death of a party.

§ 6306. Accounts and transfers nontestamentary.

No transfer resulting from the application of section 6304 (relating to right of survivorship) shall be considered as testamentary or subject to Chapter 21 (relating to intestate succession) or Chapter 25 (relating to wills).

EXHIBIT G
Introductory Note by the NCCUSL to the UNIFORM MULTIPLE-PERSON ACCOUNTS ACT

UNIFORM MULTIPLE-PERSON ACCOUNTS ACT

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

ANNUAL CONFERENCE MEETING IN ITS NINETY-EIGHTH YEAR IN KAUAI, HAWAII JULY 28 - AUGUST 4, 1989

WITH PREFATORY NOTE AND COMMENTS

Approved by the American Bar Association Chicago, Illinois, August 8, 1990

UNIFORM MULTIPLE-PERSON ACCOUNTS ACT

Final, approved copies of this Act and copies of all Uniform and Model Acts and other printed matter issued by the Conference may be obtained from:

NATIONAL CONFERENCE OF
COMMISSIONERS
ON UNIFORM STATE LAWS
211 East Ontario Street, Suite 1300
Chicago, Illinois 60611
(312) 915-0195, www.nccusl.org

UNIFORM MULTIPLE-PERSON ACCOUNTS ACT

PREFATORY NOTE

This Act is a free-standing version of Part 2 (formerly Part 1) of Article VI of the Uniform Probate Code, as revised in 1989.
The Act comprehensively covers the problems of financial institution accounts in which one or more persons have an interest.

[Petitioner Note: As noted by the NCCUSL, the Multiple Party Accounts Act "covers the problems of financial institutions". However, the Federal government, via the US Treasury and the US Bureau of Public Debt needs no such state law assistance in the issuance of US Treasury securities.]

The Act addresses the variety of state statutes that protect financial institutions in their dealings with joint and survivorship accounts, and resolves the doctrinal confusion in judicial decisions that uphold so-called Totten Trust accounts (which provide probate avoiding death benefits), yet

invalidate functionally indistinguishable POD (payable on death) accounts. The Act speaks separately to (i) ownership of accounts as between multiple owners, and the existence, validity, and revocability of survivors' benefits; and (ii) financial institution protection.

The Act recognizes that a depositor may add another person to an account for various reasons. The depositor may intend to reflect lifetime ownership of the account by more than one person, or to pass sums on deposit at death to another person, or simply to enable account transactions by a third person as a convenience without creating any ownership or survivorship rights in the third person. The traditional "joint account" does not adequately allow the depositor to distinguish among the different functions of the multiple-person account, and the depositor's use of a joint account for one purpose may yield unwanted consequences for other purposes.

The Act clarifies the relationships among the various persons involved with an account. The account may be owned by a single party or by multiple parties. Either a single-party account or a multiple-party account may include a POD beneficiary designation or an agency (power of attorney) designation or both. The Act includes sample statutory forms that provide clear and simple instructions to both the financial institution and depositor in setting up multiple-person accounts.

Under the Act, an account is owned by the parties during their lifetimes in accordance with

each party's net contribution to the account. One party owns all if that party is the sole contributor to the account. Evidence of intention by a party to make a gift to another party might change the result, but no intention to make a present gift is imputed from opening an account in two names or from making an additional deposit to an account.

[Petitioner Note: the above section of the UPC on "net contributions" is in direct conflict with the Code of Federal Regulations when the US Treasury is registered in co-ownership with an "or" connector, such as "Alice G. Novosielski or Thomas V. Proch" as the $500,000 US treasury security was registered in the Novosielski case. With an "or" connector, either party has equal access to the security, and its proceeds, during each co-owners lifetime.]

Rights at death, on the other hand, are governed by the principle that a depositor intends account balances to pass at death to the account survivors. The Act establishes a preference for survivorship between the parties whether or not specified in the account contract. But if the account contract expressly negates survivorship rights or if the account is designated as a tenancy in common, the surviving parties to the account do not take by right of survivorship.

The Act treats accounts in Totten Trust form as POD accounts. Survivorship benefits under multiple-party or POD accounts arise at death, and benefits are conferred by force of contract law and the statute. Survivorship rights cannot be changed

except by notice to the financial institution or a change in account form. Survivorship benefits, though revocable and effective on death for practical purposes, cannot be changed by will.

The Act also protects creditors of deceased parties. Under the Act a creditor may, through the personal representative of the depositor's estate, claim account balances needed to pay a debt or family allowance. The claim procedure may be initiated only on demand of the creditor and is subject to a relatively short limitation period.

The Act establishes that financial institutions may pay out on multiple-person accounts and be protected if the payment is made in accordance with contract terms. The Act covers banks, savings and loan associations, and credit unions; this feature is designed to correct existing state laws that provide variant account incidents and protections for the three types of financial institutions.

Financial institution protection is provided even though the person receiving a payment in accordance with the account contract is not the owner of the amounts received as against another party to the account or as against the estate of a deceased depositor. Ownership as between parties to accounts and financial institution protection are treated as separable and different matters.

The drafting committee believes that the Act is a substantial improvement of an already successful law. This part of the Uniform Probate

Code is one of the most broadly accepted, having been adopted either as part of the code or independently by over half the states. The Act draws on improvements made by various states that have enacted the statute. Improvements over the previous version of the statute include provision for an agency designation, optional statutory account forms, treatment of community property and other types of marital property, payments to minors under the Uniform Transfers to Minors Act, and extensive terminological and drafting simplifications and standardizations. For additional detail, see the Prefatory Note to Article VI of the Uniform Probate Code, as revised in 1989.